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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM and MICHAEL T. HOLLIFIELD,

*Petitioners,*

VS.

JOHN T. CAMPBELL, as Secretary of State of South Carolina, CARROLL CAMPBELL, as Governor of the State of South Carolina, and EARLE MORRIS, as Comptroller General of the State of South Carolina,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## Questions Presented

1. Does this Court's decision in United States v. O'Brien, 391 U.S. 367 (1968) prohibit any inquiry into legislative purpose, when the overwhelming legislative record shows a clear and unmistakable intent to retaliate against a specifically targeted organization because of its position on controversial political issues?

2. Is the First Amendment violated if a legislature deprives a specifically targeted organization of a valuable economic benefit because of its exercise of First Amendment rights?

3. Are there Bill of Attainder principles contained within the First Amendment that prohibit a state legislature from depriving a

specifically targeted organization of a valuable governmental benefit, in retaliation for its exercise of First Amendment rights, including taking positions on controversial public issues?

4. Can a legislature, consistent with the First Amendment and the Equal Protection clause and the Bill of Attainder principles contained therein deprive one specifically targeted professional association of a valuable governmental benefit because it takes controversial positions on public issues, but grant that benefit to another identical professional association that takes less controversial positions?

## Parties to the Proceeding

The parties before this Court are those set forth in the caption.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

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SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM and MICHAEL T. HOLLIFIELD,

Petitioners,

v.

JOHN T. CAMPBELL, as Secretary of State of South Carolina, CARROLL CAMPBELL, as governor of the State of South Carolina, and EARLE MORRIS, as Comptroller General of the State of South Carolina,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The South Carolina Education Association ("SCEA"), Nelle H. Taylor, Betty Jean Cunningham and Michael T. Hollifield, respectfully pray that a writ of certiorari issue to review the judgment and decision of the United

States Court of Appeals for the Fourth Circuit entered in this action on August 28, 1989.

## Opinions Below

The decision of the district court in this matter is reported at 697 F. Supp. 908 (D.S.C. 1988). (A copy is reproduced in the appendix to this petition at A-64 et seq.) The decision of the Court of Appeals reversing the decision of the district court is reported at 883 F.2d 1251 (4th Cir. 1989). (A copy is reproduced in the appendix to this petition at A-1).

## Basis for Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on August 28, 1989. A timely petition for rehearing was filed on September 7, 1989 and the petition was denied on October 17, 1989 (A-130). On

November 20, 1989, Chief Justice Rehnquist signed an order extending the time to file a petition of certiorari to and including December 26, 1989. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law ... abridging the freedom of speech, or of the Press...

The Fourteenth Amendment to the Constitution provides:

> ...nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10 of the Constitution provides:

> No State shall... pass any Bill of Attainder.

Section 8-11-92 of the South Carolina Code provides:

A. Nonprofit charitable organizations for which such payroll deductions may be made shall include any nonprofit, eleemosynary corporation, association or organization which is organized and operated exclusively for charitable, health or welfare services to the public and meets all of the following qualifications:

1. Is and continues to be organized and qualified to solicit and operate under the laws of this State, pursuant to Chapter 55 of Title 33;

2. Provide direct and continuing services to or on behalf of the citizens of the State. For purposes of this section, "direct and continuing service" means: (a) services other than legal services which are provided directly to and specifically for one individual or one family; or (b) services which are in the nature of medical research; or, (c) services which involve the collection and administration of funds by umbrella organizations for other organizations, all of which qualify under this act;

3. Is recognized as tax exempt under Section 501(c)(3) of Title 26, United States Code (the Internal Revenue Code of 1954, as amended);

4. Is not an organization contemplated by Section 501(c)(4), 501(c)(4), 501(c)(5) or 501(c)(6) of Title 26, United

States Code (the Internal Revenue Code of 1954, as amended) and is not an organization primarily engaged in the propagation of a religious faith or belief; this prohibition shall included, but not be limited to, organizations primarily engaged in lobbying or political activity;

5. Is operated without discrimination in regard to all persons served, and complies with all requirements of law, including administrative regulations, respecting nondiscrimination and equal opportunity regarding its officers, staff, employees and volunteers;

6. Has neither a parent organization nor a subsidiary organization which fails to meet qualifications herein contained in items (1) through (5).

Section 8-11-83 of the South Carolina Code provides:

The Comptroller General and all other State agencies, upon request of employees of the State, shall make deductions from the compensation of the employees for the payment of membership dues for the South Carolina State Employees Association. The Comptroller General and State agencies shall pay over to the Association all amounts so collected or withheld. Retirees from a State agency also may have withheld from their State retirement benefits their membership dues for the South Carolina State Employees Association. No deduction is permitted if the Association at any time engages in

collective bargaining or encourages its members to strike.

The Marchant Amendment (uncodified) provides:

> Section 3. Notwithstanding any other provision of this act, including definitions of organizations eligible for payroll deductions, such provisions shall not be construed to include any organization recognized or classified as a labor organization under Section 501(c)(5) of Title 26 of the United States Code Annotated, by the United States Department of Labor, or by any court of competent jurisdiction nor shall any such deduction be made if any of the proceeds of the deduction would be for the benefit of any such organization.

## STATEMENT OF THE CASE

This case arises out of an open and flagrant effort by the South Carolina General Assembly to deprive the South Carolina Education Association ("SCEA") of a valuable governmental benefit, payroll deduction, in retaliation for the organization's exercise of First Amendment rights. The members of the state legislature that passed the law

under challenge made no attempt in their debate to mask the purpose of the provision at issue here -- namely to injure the SCEA because of its advocacy of controversial legislative proposals, endorsements of candidates (including the endorsements of opponents of sitting members of the General Assembly) and affiliation with the National Education Association ("NEA"). Over a period of 18 months, both bodies of the General Assembly devoted hours and hours to the debate of the proposed legislation, with the primary, almost the exclusive issue, under dispute being the denial of payroll deduction to the SCEA. Finally, after both bodies had adopted differing versions of the bill, the General assembly twice rejected conference reports until the final bill included language foreclosing any loophole for

the SCEA. This final, essential amendment, had one purpose and one purpose only: the denial of payroll deduction to the SCEA.

When the legislature later discovered that the net it cast caught another, less-controversial state employee association, it opened the net specifically to let that organization escape. The final result was that the SCEA and the SCEA only was deprived of this valuable benefit, precisely the result that the General Assembly loudly broadcast as its true purpose.

The evidence of this purpose was overwhelmingly proved to the District Court which found that the law violated both the First Amendment and the equal protection clause. The Fourth Circuit did not overturn the finding that this was indeed the true purpose of the law.

But relying on a totally distorted view of this Court's decision in United States v. O'Brien, 391 U.S. 367 (1968), it came to the conclusion that federal courts are prohibited from examining legislative purpose, even when a First Amendment retaliatory motive is loudly proclaimed in the legislative halls and in the official legislative journals. That conclusion is totally counter to O'Brien, other decisions of this Court, and the purpose of the First Amendment.

A. Factual Background. The SCEA is an advocacy and service organization for employees of public school systems and programs.[1] Prior to 1981, the SCEA

1. Membership in the SCEA is open to all employees of public school systems and programs, regardless of professional status or education, and includes superintendents, classroom teachers, guidance counselors, teacher aides, cooks, custodians, bus drivers and librarians. See A-66.

had a membership in excess of 18,000 and enjoyed voluntary payroll deduction from over two thirds of South Carolina's public school districts (A-67).[2] The SCEA was in 1981 the sole public employee organization in South Carolina receiving payroll deduction from governmental employers.

In the years immediately preceding the legislative battle over payroll deduction for the SCEA, the organization took high profile positions advocating a variety of controversial legislative initiatives and endorsing candidates for public office, including opponents of sitting members of the South Carolina General Assembly (A-67-68). Throughout

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2. Payroll deduction was provided to the SCEA by school districts either by payroll deduction directly to the organization or through local teachers' credit unions.

this period, the SCEA maintained its affiliation with the NEA, which is classified under the Internal Revenue Service Code, 26 U.S.C. Section 501(c)(5), as a labor organization and has taken various public positions which have been controversial in South Carolina. The SCEA is classified under the Internal Revenue Code, 26 U.S.C. Section 501(c)(6), as a "business league." The legislative campaign to deal with payroll deduction began in 1980 and ended in June, 1981, a period of 18-months. It is uncontroverted that 80-90% of the debate time on the issue was devoted to the SCEA, the NEA and its public positions.[3] It was also

3. Senator Harry Chapman testified that 75-95% of the debate time in the Senate was devoted to the SCEA: "It was strictly the SCEA and their espousing liberal causes, their connection with the NEA." (Joint Appendix in the Fourth Circuits, "JA"-195). Rep. Ernest

uncontroverted that the General Assembly twice rejected conference reports on the payroll deduction bill even though they contained all the so-called "neutral" regulatory provisions of the law. It did so because they did not contain an amendment designed to prevent payroll deduction specifically for the SCEA, and the third conference report was passed only after this strict prohibitive language was added to the bill.

The controversy over payroll deduction arose in 1979 when the Attorney General of the State, Daniel McLeod, issued an opinion concluding that no voluntary payroll deduction by a public body was permissible without

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Nunnery testified that in the House "the overwhelming majority of the [debate] time, I would say 75 to 80 percent at least if not more" was devoted to the SCEA and the NEA (JA-232).

legislative authorization. At that time, approximately two-thirds of the school districts of the state voluntarily provided payroll deduction to the SCEA, and the Attorney General's opinion, which has no binding effect, was widely ignored. (A-10).

In an effort to preserve its long-standing payroll deduction benefit, the SCEA supported proposed legislation in the 1980 General Assembly authorizing payroll deduction for professional associations. This proposed legislation triggered vigorous and vocal opposition, with the debate on the floor specifically focused on the SCEA. The leading opponent of the law, Senator John Drummond, read extensively from the SCEA's publications, pointed out and attacked by name the SCEA's leadership sitting in the gallery, criticized the

organization for its legislative agenda and denigrated the SCEA's endorsement of candidates and affiliation with the NEA (A-69). He was joined by other legislators all of whom focused their criticism of the legislation upon the SCEA, its leadership and affiliation with the NEA, with one legislator commenting that the SCEA's president, Elaine Marks, should spell her name "Marx" (A-70). The 1980 bill ultimately died when the opponents' filibustering denied the House the opportunity to take up the legislation before the General Assembly adjourned.

The payroll deduction issue took up more urgency in the 1981 legislative session when the State's Comptroller General stated that he would cease allowing payroll deduction for United Way contributions unless the practice

was given legislative authorization. A bill authorizing such payroll deductions was filed in the House and an amendment was offered authorizing deductions for professional associations. The professional association amendment was adopted by the House on January 28, 1981 by a narrow vote, 57-54. (A-73) Opponents of payroll deductions for the SCEA promptly offered an amendment, which became known as the "Marchant Amendment" after its author, Representative Thomas Marchant, which prohibited payroll deduction benefits for any "labor organization" or where the "proceeds of the deduction would be for the benefit of any such organization." (A-12). The latter portion of the amendment, relating to non-labor organizations which shared the proceeds of payroll deduction with a

labor organization applied to a class of one: the SCEA which was affiliated with the NEA. In fact, Representative Marchant stated on the floor of the House that his amendment was for the purpose of denying payroll deduction to the SCEA and its affiliate, NEA, and acknowledged at trial that he could name no other groups than the NEA and the SCEA which were covered by his amendment (JA-58, 305).

As the bill progressed through the General Assembly, opponents of the SCEA expressed their concern that the provision of the House bill allowing payroll deduction for professional associations might allow the SCEA payroll deduction notwithstanding the Marchant Amendment. Representative Marchant wrote Attorney General Daniel McLeod on January 30, 1981 for the

purpose of obtaining an Attorney General's opinion on the question and advised the Attorney General that he and his allies were filibustering the bill until an opinion was issued confirming that payroll deduction would not be available "to the SCEA and/or NEA." (JA-798-799). Marchant stated in his letter to the Attorney General:

> [The House bill] has been debated for two weeks, with a major point of concern being opposition to deductions for the South Carolina Education Association. Under past and present practices, the dues that are required to be paid to the SCEA includes dues for membership in the National Education Association... The opposition has been to allowing deductions that could benefit either one or both of these organizations. (JA- 797-798) (Emphasis added).

After correspondence from the Attorney General confirmed Marchant's analysis of the adverse effect of the language on the SCEA, the bill passed the House.

Representative Marchant maintained an active interest in preventing payroll deduction for the SCEA thereafter. Since under the House passed bill the SCEA could maintain payroll deduction if it ceased forwarding a portion of its dues to the NEA, Representative Marchant wrote the Secretary of the Treasury, Donald Regan, on April 21, 1987 for the purpose of having the SCEA reclassified as a labor organization (A-76). Representative Marchant admitted at trial that the purpose of his communications with the Internal Revenue Service was to prevent any loophole for the SCEA to obtain payroll deduction under the House passed bill (JA-332).

The heated and vituperative House debate over payroll deduction for the SCEA greatly concerned key senators supporting payroll deduction for the

United Way. In an effort to insure that some bill would be passed that would protect deductions for that charity, Senator Heyward McDonald, redrafted the House passed bill to create a six part test which appeared neutral on its face but was designed to prevent payroll deduction for the SCEA and a controversial, non-employee organization.

The 1981 Senate debate again focused almost exclusively upon the SCEA and the NEA, with various senators either criticizing the SCEA's involvement in politics ("vicious, political activist union", exclaimed one senator (A-79)), its affiliation with the NEA, and its advocacy of controversial public positions.

The Senate eventually passed a payroll deduction bill which denied payroll deduction to the SCEA through

the McDonald six-part test, but contained a loophole that potentially allowed SCEA deduction through credit unions. The House declined to concur in the Senate bill, and a conference committee was appointed to resolve the differences between the chambers.

A six-member conference committee was appointed, with three members from the House and three from the Senate. Representative Marchant was one of the House conferees. He insisted that the Marchant Amendment be included in the Senate bill to close the potential loophole for the SCEA through the credit union. Representative Marchant explained to his fellow conferees that certain local education associations, including his own local Greenville County Education Association, received payroll deductions through credit unions, and

the Senate passed bill absent the Marchant Amendment would allow this practice to continue (JA-78). Twice the conferees voted out a new bill without the full language of the Marchant Amendment. In each instance, even though the bill contained every other "neutral" regulatory provision relating to dues deduction, the General Assembly refused to accept the conference report. In one instance, a senator commented that he wanted "to put twenty nails in the SCEA's coffin to be absolutely sure that they are dead." (JA-80,168). The Senate then rejected the conference report.

Representative Marchant vigorously opposed the second conference report which did not contain the full language of his amendment and argued on the floor of the House that the omitted portion of the Marchant Amendment was essential "to

deny the benefit to the NEA and prevent the SCEA from collecting the dues and passing them on to the NEA." (JA- 82). It was only when the conferees voted to add the entire Marchant Amendment, including the provision prohibiting payroll deduction for any organization not a labor union which forwarded a portion of the proceeds of payroll deduction to a labor organization that the law passed.

This legislative debate consumed the attention of the General Assembly for 18 months. Hundreds of hours of debate time was devoted to the matter which culminated in every organization that was then enjoying the benefit being allowed to continue it, with one exception and one exception only -- the SCEA. The state legislature, which had never previously regulated the payroll

deduction practices of the school districts and had only the remotest interest in telling school district employees what they should be allowed to deduct from their paychecks, ended up by prohibiting a willing employer and a willing employee from dealing with their own employee's money.

The finely tailored language of the 1981 legislation successfully foreclosed payroll deduction for the SCEA. Immediately after the adoption of this legislation all school districts in South Carolina terminated payroll deduction benefits for SCEA members. This sudden and uniform loss of payroll deduction across the State had a devastating effect upon the SCEA's membership, financial standing and advocacy program. In the first school year following the loss of payroll

deduction benefits, the SCEA suffered an unprecedented drop of 21% in membership,[4] which created an immediate fiscal crisis for the organization(JA-148-150). The SCEA was required to lay off staff, reduce the remaining staff temporarily to a four day work week and limit the various meetings and instructional conferences of the organization. The SCEA's publications, which had been waved on the floor by the organization's opponents during the legislative debate, were cut back and the legal advocacy program subsequently reduced. The SCEA's professional staff were forced to devote

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4. In school districts where SCEA had previously enjoyed payroll deduction, the organization suffered a 23.13% drop in membership. In those school districts which did not provide payroll deduction to SCEA members in the year prior to loss of the benefit, the SCEA suffered only a 9.06% loss in membership (JA 793-794).

their primary energies to maintenance of membership and give up advocacy services (JA-149-150).

Grant of Payroll Deduction to the State Employees Association: The skillfully drafted language of the 1981 statute caused immediate injury only to the SCEA. In 1985, however, another public employee organization, the State Employees Association, determined that it required payroll deduction benefits and found itself caught in the statutory net cast for the SCEA.[5] This result is hardly surprising since the SCEA and the State Employees Association are remarkably similar organizations, with both serving public employee

5. The State Employees Association is classified as a labor organization under 501(c)(5) of the Internal Revenue Code and, thus, failed to meet the six part test as well as the requirements of the Marchant Amendment.

memberships, lobbying the General Assembly and providing grievance assistance to their members. (JA 82-84, 361-365). A notable distinction in the two organizations is that while the SCEA has been a vocal advocacy organization on the progressive or "liberal" end of the political spectrum, the State Employees Association has been a more conservative group within the political center of South Carolina politics.

The State Employees Association required a change in the 1981 legislation to obtain payroll deduction benefits, and the organization set about in the 1985 legislative session to obtain any exemption from the statue. A specific exemption for the South Carolina State Employees Association by name was proposed as a temporary proviso to the proposed 1985 appropriations act

in the House. The proviso authorizing payroll deduction for the State Employees Association ultimately passed the Senate after the vote was broken by the Lt. Governor. The temporary proviso was renewed in the 1986 Appropriations Act without any legislative debate.

In 1987, permanent legislation was introduced and ultimately passed (SC Code 8-11-92, p. 4 above) granting the State Employees Association by name the privilege of dues deduction.

The receipt of payroll deduction benefits has proven to be an extraordinary benefit to the State Employees Association. Since obtaining the benefit in 1985, the State Employees Association, which had previously had a stagnant membership of approximately 9,000, has doubled its membership to approximately 18,000. The executive

director of the State Employees Association, Mr. Larry Ellis, testified at trial that the loss of payroll deduction would have a severe impact on his organization. (JA 374-375).

B. The District Court Decision Below.

The District Court's decision and order found that the statutory scheme denying payroll deduction benefits to the SCEA, while permitting the benefit to be enjoyed by a similarly situated employee organization -- the State Employees Association -- was motivated by the SCEA's affiliation with the NEA, its advocacy of unpopular legislative positions, endorsements of certain candidates for elective office and other content-based reasons. Concluding that "[s]uch factors go to the essence of the First Amendment and concern some of the most fundamental rights under the

Constitution," the District Court declared the statute in question unconstitutional and thus allowed payroll deduction benefits to be extended to the SCEA on the same conditions under which the State Employees Association was granted dues check-off privileges (A-122).

The District Court based its order declaring the laws in question unconstitutional on two grounds. First, the Court relied on the First Amendment, since the law deprived a particular group of an important economic benefit on the basis of the content of its message and its associational rights. Secondly, the Court found that plaintiffs' equal protection rights were violated since the law in question was passed specifically to "get" and injure the South Carolina Education

Association, an illegitimate governmental interest under the Supreme Court decision in United States Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (A-120).

C. The Court of Appeals Decision.

The Court of Appeals reversed the decision of the District Court, although it did not dispute the conclusions drawn by the lower court that the legislative record revealed the improper purpose noted. The Court of Appeals held first, that the legislation did not "directly inhibit[] free speech or association." (A-27). It also noted that government is not required to assist First Amendment actors by providing them with tax exemption or other economic benefits such as payroll deductions, an argument never made by petitioners.

But the Court below held that the district court erred by inquiring into legislative motives in any way and finding that an illicit First Amendment motive behind the legislation. Relying upon this Court's decision in United States v. O'Brien, 391 U.S. 367 (1968), the Court found that there are "limited exceptions to the principle that judicial inquiry into legislative motive is to be avoided," (A-35), such as race and sex discrimination and the religious establishment cases. The type of inquiry involved here -- whether the purpose of the legislation was to punish the SCEA because of its First Amendment activities -- was not within the exceptions noted. Under those circumstances, the Court found, the district court erred in allowing any evidence to be admitted on legislative motive.

It also found that the type of evidence relied upon was insufficient to show that the predominant or substantial motivating factor was the illicit one cited. A number of legislators voluntarily appeared as witnesses at the trial (without raising any legislative immunity) and testified as to their recollection of what was said during the debate on the bill. The sponsors of the law also testified as to their motives in proposing the legislation, specifically the anti-SCEA animus. Relying upon the dissenting opinion of Justice Scalia (in which he spoke only for himself and Chief Justice Rehnquist in a 7 to 2 decision) in Edwards v. Aguillard, 482 U.S. 578, 636-637 (1987), the Court of Appeals stated that it was very difficult to discern the motivation of even a single legislator. It

concluded that the legislative record revealed that since only nine legislators were specifically identified as having made anti-SCEA remarks, there was not sufficient proof of the improper purpose alleged.

The Court then held that there was no equal protection violation even though the State Employees Association -- an identical professional association representing state employees in other job categories -- received the benefit of payroll deduction in subsequent legislation. The Court of Appeals concluded that only a rational relationship test must be met, since it had refused to accept the evidence of illicit motive found by the district court. That test was met in this case since it concluded that the state has an interest in "enacting legislation which

is a potential benefit to all state employees," (A-59) as opposed to all educational employees of school districts who were members of the SCEA. It offered no explanation as to why such a distinction was rational.

REASONS FOR GRANTING THE WRIT

The decision below involves an impossible reading and expansion of the O'Brien decision that cannot be squared with this Court's subsequent decisions in the First Amendment and equal protection area. The O'Brien case acknowledged that while ordinarily an inquiry into legislative motivation is to be avoided, that is not true when "the very nature of the constitutional question requires an inquiry into legislative purpose," 391 U.S. at 383, n. 20. The Court below ignored this important and relevant explanation of

the O'Brien principle. If the "purpose" of legislation was precisely to injure, burden and punish a First Amendment actor in retaliation for the exercise of First Amendment rights, then the "nature of the constitutional question requires an inquiry" into that purpose. Surely there are "Bill of Attainder" principles in the First Amendment that prohibit legislatively-dictated burdens on First Amendment actors because of their exercise of free speech rights, and permits inquiry into such purposes.

Furthermore, the Court below ignored numerous cases decided by this Court subsequent to O'Brien that held that legislative purpose is relevant to determine the constitutional validity of legislation: see Edwards v. Aguillard, 482 U.S. 578 (1987)(inquiry into legislative purpose necessary to

determine First Amendment establishment of religion issue); Wallace v. Jaffree, 472 U.S. 38 (1985)(same); Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 266 (1977)(inquiry into legislative purpose necessary to determine whether equal protection violation occurred; questioning of individual legislators as witnesses permitted in some instances); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979)(inquiry into legislative purpose necessary to show equal protection violation).

Even in the First Amendment free speech and press areas, this Court has acknowledged the importance of discerning legislative motive. In discussing the landmark decision in Grosjean v. American Press, Inc., 297

U.S. 233 (1936), this Court noted that part of the reason for striking down the 2% tax on receipts from advertising by the larger newspapers in the State was the Court's perception that the law was aimed at newspapers critical of then Governor Huey Long. "We think that the result in Grosjean may have been attributable in part to the perception on the part of the Court that the state imposed the tax with the intent to penalize a selected group of newspapers." Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575, 580 (1973)(emphasis added). See also Boos v. Berry, 108 S. Ct. 1157, 1163 (1988)(acknowledging that desire of legislative body in dealing with First Amendment protected materials is

relevant to determine whether constitution violated).

The decision of the Fourth Circuit below also ignored and misconstrued at least two other major constitutional principles well-established by this Court's precedents in the First Amendment area.

1. The Court of Appeals held that because the legislative scheme did not "directly inhibit[] free speech or association," (A-27), there could be no First Amendment violation. This holding is directly counter to four decades of this Court's jurisprudence that holds that while government may deny benefits to a person for many reasons, it cannot deny such benefits "because of his constitutionally protected speech or associations..," Perry v. Sindermann, 408 U.S. 593, 597 (1972).

2. The decision below also ignored significant decisions of this Court that hold that -- regardless of the legislative motive -- legislatures cannot treat similarly-situated First Amendment actors differently in any area, whether it be the granting of a benefit or the imposition of a tax. Such a differentiation is considered content-based discrimination, requiring the application of the strict-scrutiny test. See Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987) and Minneapolis Star & Tribune Co. v. Minnesota Comm. of Revenue, 460 U.S. 575 (1963) (differential tax treatment of similarly situated First Amendment actors requires strict scrutiny).

In addition, the decision below concluded that the lower court's finding that an improper, anti-expressive

motivation was behind the legislative scheme was based only on the comments of "a handful of voluble members," (A. 25). This is a total distortion of the legislative record submitted to the trial court and on which it based its decision. Even without the testimony of a single legislator, the evidence of anti-expressive animus aimed at the SCEA in the legislative record was unmistakable and overwhelming. Furthermore, the analysis of the Fourth Circuit makes it impossible to discern legislative purpose unless every member of the legislature stands up and endorses the comments of those speaking in favor of the bill.

Finally, the Court's decision below is in direct conflict with a case from the 11th Circuit, directly in point, Georgia Association of Educators,

Gwinnett County v. Gwinnett County School District, 856 F.2d 142 (11th Cir. 1988). There the court upheld the validity of a complaint that claimed that a local school district violated the plaintiffs' First Amendment rights by terminating plaintiffs' payroll deduction privileges in retaliation for their exercise of their First Amendment rights, including their associational rights, namely their connection with the National Educational Association, ("NEA"), precisely the same claim as that presented here. In that case the court concluded that the actions of the school board, if proven, would violate the 1st Amendment. The conflict in the two cases produces the anomaly that if First Amendment retaliatory action against an organization is taken by a school board at a local level, the

federal courts may take corrective action. But if exactly the same action is taken against the same organization at a state level, the federal courts are prohibited from acting. In other words despite the plain words of the First Amendment, it cannot be enforced at a legislative level. Neither history, nor logic nor the decisions of this Court can support such a finding.

## I.

## THE PANEL DECISION IGNORED BASIC FIRST AMENDMENT PRINCIPLES PROHIBITING GOVERNMENT FROM DEPRIVING A PERSON OR GROUP OF VALUABLE BENEFITS BECAUSE OF,OR IN RETALIATION FOR,THE EXERCISE OF FIRST AMENDMENT RIGHTS.

The District Court found that the legislative scheme at issue here was a blatant and obvious effort to injure the SCEA by depriving it of the valuable benefit of payroll deduction while allowing a similarly-situated but less

controversial group -- the State Employees Association -- to obtain that benefit. The court concluded that this legislative effort, based as it was on the General Assembly's displeasure with political positions taken by the SCEA, violated the First Amendment, since no government body can deprive a person or group of a valued benefit because of, or in retaliation for, the exercise of First Amendment rights.

The decision of the Court of Appeals makes no effort to dispute this conclusion. Its response it that a law can violate the First Amendment only if contains a direct restraint on the exercise of First Amendment rights: "The district court did not assert that the challenged legislation violated the First Amendment based on a showing that

it directly inhibited free speech or association." (A-27)

The statement that a law violates the First Amendment only if it directly inhibits the exercise of free speech or association rights is contrary to forty years of First Amendment jurisprudence. This Court held in Perry v. Sindermann, 408 U.S. 593, 597 (1972):

> For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny the benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."

In a case almost directly in point (never discussed or cited below),

Georgia Association of Educators, Gwinnett County v. Gwinnett County School District, 856 F.2d 142 (11th Cir. 1988), the Court upheld the validity of a complaint that claimed that a local school district violated the plaintiffs' First Amendment rights by terminating plaintiffs' payroll deduction privileges in retaliation for their exercise of their First Amendment rights, including their associational rights, namely their connection with the National Educational Association, ("NEA"), precisely the same claim as that presented here.

The court's refusal to take account of and recognize the Perry and the First Amendment retaliation line of cases lead inevitably to its erroneous conclusions about the reach and meaning of the O'Brien case. If it is true that no

government body can deprive a person or organization of a valuable benefit "because of" the exercise of First Amendment rights, then inquiry into that anti-expressive motivation -- that "legislative purpose" -- is required since it is the "very nature of the constitutional question," 391 U.S. at 383, n. 20, which a court must examine. Thus it fits into the exceptions noted in O'Brien where inquiry into legislative motivation is "require[d]." See discussion below in Point II.

II.

THE PANEL DECISION INCORRECTLY REFUSED TO CONSIDER THE OVERWHELMING EVIDENCE OF IMPROPER LEGISLATIVE PURPOSE TO HARM THE SCEA BECAUSE OF ITS POLITICAL ACTIVITIES.

This Court has indicated, subsequent to O'Brien, that an inquiry into legislative purpose would be necessary to determine whether a law was

passed with the intent of discriminating against racial minorities, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65 (1977), or against women, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979). Similarly inquiry into legislative purpose is necessary to determine whether a law was passed with a religious purpose in mind, Edwards v. Aguillard, 482 U.S. 567 (1985) and Wallace v. Jaffree, 472 U.S. 38 (1985).

The decision below would limit the application of the O'Brien exception to these types of cases only, as well as cases involving legislation where there was a direct inhibition on the exercise of First Amendment rights or legislation which has "the inevitable effect of inhibiting freedom of speech," A-20). To

support this proposition, the panel cites the differential taxation cases (Ragland and Minneapolis Star discussed in Point III below) and Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1987), a case where the executive department prohibited the solicitation of charitable contributions from government personnel, and the claim was made that the restrictions imposed on who can solicit was content-based. This Court concluded that if the restrictions were a "facade for viewpoint based discrimination," Id. at 812-13, then the limitation was subject to strict scrutiny and further inquiry was necessary.

In the First Amendment free speech and press areas, this Court has also acknowledged the importance of

discerning legislative motive. In discussing the landmark decision in Grosjean v. American Press, Inc., 297 U.S. 233 (1936), this Court noted that part of the reason for striking down the 2% tax on receipts from advertising by the larger newspapers in the State was the Court's perception that the law was aimed at newspapers critical of then Governor Huey Long. "We think that the result in Grosjean may have been attributable in part to the perception on the part of the Court that the state imposed the tax with the intent to penalize a selected group of newspapers." Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575, 580 (1973). If such inquiry into legislative "intent" was part of the reason for striking down the law at

issue in Grosjean, then surely inquiry into First Amendment retaliatory motivation on the part of a legislature is still permitted.

The conclusion of this Court that it is permissible to look at motive where it is part of the constitutional question to be examined -- "a substantive element of the test of constitutionality," as the decision below phrased it -- must mean that it is also permissible to do so when the claim is made that the legislation was specifically aimed at a single organization "with the precision of a laser beam," News America Publishing Co. v. FCC, 844 F.2d 800, 814 (D.C. Cir. 1988), to punish it for the exercise of its First Amendment rights. Such legislative "exclusive focus on a single party," id. at 813, implicates important

values in the First Amendment area and requires close judicial scrutiny since it indicates that the adverse government action was taken on the basis of content, that is, because of the message of a particular group or organization.

That is far different from the situation presented in O'Brien itself. In that case the most that could be said was that there were generalized anti-expressive sentiments made by some members of Congress when the anti-draft-card burning law was passed. That would not be enough to invalidate the law. But laser-beam legislation designed to punish one group only because of its exercise of First Amendment rights is entirely different.

The lower court's reliance on Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) is misplaced. There this

Court held that a zoning ordinance regulating adult book stores that was justified by the city's desire to regulate the secondary effects of such stores was valid, since there was no direct intent to regulate the content of the books in those stores. Subsequently in Boos v. Barry, 108 S. Ct. 1157 (1988) in discussing Renton, which it distinguished from Boos, this Court noted that "if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate." 108 S. Ct. at 1163 (emphasis added). In short, it is still necessary to examine the legislature's "desire," i.e., its "motivation," in passing a law that impacts on a First

Amendment actor. If the "desire" is to regulate the secondary effects of that person's activity, the law can be sustained. If the legislature wishes to regulate the content itself, then strict scrutiny will apply.[6] But it is

6. This analysis is supported by other decisions in this Court and the lower federal courts. See Board of Educ. Island Trees v. Pico, 457 U.S. 853, 874 (1982)(school board order to remove certain books removed from the school library was or was not a First Amendment violation depending on the purpose behind the removal: "Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decisions to deny respondent access to ideas with which petitioners disagreed, and if this intent was the decisive factor [i.e. "substantial factor"] in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution") (emphasis in original); Hunter v. Underwood, 471 U.S. 222 (1985)(facially neutral legislation disenfranchising persons convicted of crimes of moral turpitude held to be unconstitutional in view of historical proof that motivating factor in 1901 constitutional convention was desire to

necessary to examine that legislative "desire."

III.

THE PANEL DECISION IMPROPERLY IGNORED RELEVANT SUPREME COURT CASES HOLDING THAT LEGISLATION TREATING SIMILARLY-SITUATED FIRST AMENDMENT ACTORS DIFFERENTLY IS SUBJECT TO STRICT SCRUTINY.

The decision below acknowledged that another professional organization, the State Employees Association, did obtain the benefit of payroll deduction from the legislature some four years after it had been denied to the SCEA. Applying a rational relationship test to this situation, the panel concluded that

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discriminate against blacks; O'Brien and Palmer v. Thompson, 403 U.S. 217 (1971) distinguished); Women Involved in Farm Economics v. U.S. Dept. of Agric., 876 F.2d 994, 1005 n. 8 (D.C. Cir. 1989)("If it can be established that Congress' subjective motivation was purposefully to discriminate along lines that would warrant heightened scrutiny, such actual legislative motivation can be highly relevant.")

there was a rational basis for that distinction because the State had an interest in "fostering good employee-employer relations and improving morale among the State's employees," and that it is a "'general interest' association open to all employees." (A-31). Nowhere does the court below dispute the finding of the district court that the two organizations perform precisely the same functions for their members, but that the State Employees Association does not take controversial positions on public matters as did the SCEA.

The decision that a rational relationship test should be applied in this case is contrary to ruling Supreme Court precedents. This Court has held numerous times that government is not allowed to impose burdens on one First Amendment actor or group (or deny

benefits to that actor or group) while benefiting another First Amendment actor in the same category. Such a differentiation is considered content-based discrimination, flatly prohibited by the First Amendment, regardless of the motive behind the law. In addition, such a differentiation would render the law irrational under the equal protection clause.

The principle is illustrated by the differential taxation cases, most recently Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987). In that case a state tax was applicable only to periodicals or journals that were not of a religious, professional, trade or sports nature. Although a tax could be imposed on all businesses, including all media companies, a tax cannot be imposed only on newspapers or magazines,

Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1973) or only on certain magazines or newspapers. Such a tax is an unlawful, content-based imposition, prohibited by the First Amendment. And it would be an unlawful tax whether or not the legislature acted with an improper motive or not.

This analysis is also supported by a recent Court of Appeals decision in the District of Columbia, News America Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988). In that case, Congress had passed a law ("the Hollings Amendment") prohibiting extension of then-current, temporary waivers of the "cross-ownership" rules of the FCC which had the effect of requiring the Australian publisher, Rupert Murdoch -- and only Mr. Murdoch -- who owned

newspapers and television stations in two communities, New York and Boston to sell one of his media properties in those cities. Murdoch brought suit, claiming that the legislative purpose behind the law was to "get" him because of editorial positions his newspapers had taken which had angered certain influential Senators. The Court of Appeals found the law unconstitutional on First Amendment grounds. It held that more than a rational relationship test would have to be applied:

> Where legislation affecting speech appears under-inclusive, i.e., where it singles out some conduct for adverse treatment and leaves untouched conduct that seems indistinguishable in terms of the law's ostensible purpose, the omission is bound to raise a suspicion that the law's target is the message. Accepting that intuition without making an actual determination of the legislators' motives, the Supreme Court has for the regulation of speech insisted on a closer fit between its

> apparent purpose than for other legislation." [citing Ragland and Minneapolis Star] 844 F.2d at 804-5

The Court concluded that "the First and Fourteenth Amendments demand a better fit between the law and its asserted purposes than we can find in the Hollings Amendment." (Id.)

In this case also, the Marchant Amendment accomplished precisely what the Hollings Amendment had done in the Murdoch case. It focused on one group "with the precision of a laser beam" (Id. at 814) to deprive one entity and one entity only of a valuable government benefit because of that entity's exercise of First Amendment rights.[7]

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7. As the evidence at the trial showed, the General Assembly refused to pass the bill in question twice unless it contained the restrictive language of the Marchant Amendment which fit one organization and one organization only: the SCEA which alone had the prohibited connection with a Section 501(c) (5) organization. See 697 F. Supp. at 911. The Court's effort to describe the law

IV.

THE DISTRICT COURT PROPERLY ALLOWED LEGISLATORS TO TESTIFY AS WITNESSES.

The panel also held that legislators should not have been called as witnesses to testify, commenting that under the Supreme Court decision in Arlington Heights, calling a legislator to testify on the motive behind his action is "usually to be avoided," slip opinion at 21, quoting from 429 U.S. at 268, n. 19.

In this case, none of the legislators objected to attending court as witnesses and testifying with respect to their legislative acts. Even those legislators who sponsored, endorsed or supported the law had no objection to

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as a facially neutral provision seeking to regularize payroll deductions for all professional associations fails to take account of this fact.

appearing as witnesses to explain how the law came to be enacted. While indeed there may be circumstances when legislators may assert a privilege not to be called as a witness in a civil case, see Arlington Heights, 429 U.S. at 268, the immunity is a personal one which was never asserted here.

The main thrust of the legislators' testimony was with respect to what they and others said on the floor of the General Assembly at the time the legislation was considered. The district court was careful to focus their testimony on what was said by themselves and others, not what their personal motivations may have been, except for testimony by the sponsors of the legislation, which was clearly

admissible under Wallace v. Jaffree.[8] That approach conforms to the rule established by the Supreme Court in the Arlington Heights case. There the Court noted that the "legislative or administrative history may be highly relevant [to determine legislative motivation], especially when there are contemporary statements by members of the decision making body, minutes of its meetings or reports." Id. at 268.

The legislators called in this case testified precisely to the "contemporary

8. In some cases, legislators did testify with respect to their own motivations in introducing amendments to the legislation and sponsoring changes in the wording. However, this testimony by sponsors is especially probative with respect to the intent of the legislation. See Wallace v. Jaffree, 472 U.S. 38, 57 (1985)(sponsor of law providing for meditation or prayer in public schools testified at trial that his legislation was an effort to return voluntary prayer to the public schools; law invalidated).

statements by members of the" General Assembly and summed up the gist of the debates on the floor. Their testimony was at least as reliable as newspaper accounts of legislative deliberations, which has been relied upon in other cases to determine legislative intent, see Epperson v. Arkansas, 393 U.S. 97, 108, n. 16 (1968).

To the extent that there was testimony as to individual motivation by legislators, that also is permitted by Arlington Heights: "In some extraordinary instances the members might be called to the stand to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." Id. at 268. The District Court, which was in the best position to evaluate whether such circumstances

existed in this case, decided that it was and allowed some limited testimony in that regard, particularly with respect to the sponsors. The Court specifically stated that it was not relying to any great extent on the testimony of individual legislators as to their intent, but relied more heavily on the contemporaneous legislative history: "the testimony by legislators at trial regarding their intent, while not as persuasive as contemporaneous evidence at the time of enactment, tend to confirm the presence of content-based intent." (A-118).

## CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Dated: New York, New York
December 21, 1989

Respectfully submitted,

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# APPENDIX

The SOUTH CAROLINA EDUCATION ASSOCIATION, et al.; Nelle H. Taylor, Berry Jane Cunningham; Michael T. Hollifield,

Plaintiffs-Appellees,

v.

John T. CAMPBELL, In his Official Capacity as Secretary of State of South Carolina; Carroll Campbell, In his Official Capacity as Governor of the State of South Carolina; Earle Morris, In his Official Capacity as Comptroller General of the State of South Carolina,

Defendants-Appellants,

The South Carolina State Employees Association; South Carolina School Boards Association, Inc.; Richland County School District Number One, Spartanburg County School District Number Three, Orangeburg County School District Number Five, Marlboro County School District and Dr. James M. Brown, Superintendent and Chairman of the Board of Trustees of the Oconee County School District, Amici Curiae.

No. 88-3605

United States Court of Appeals, Fourth Circuit.

Argued Jan. 12, 1989.

Decided Aug. 28, 1989.

Before CHAPMAN and WILKINS, Circuit Judges, and KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

CHAPMAN, Circuit Judge:

This case involves a challenge by plaintiffs/appellees, the South Carolina Education Association and various members of that organization (hereinafter collectively referred to as "SCEA"), to a statutory arrangement[1] they allege was designed specifically to deny the SCEA payroll deduction benefits and thereby impair the effectiveness of the association. In October 1987, the SCEA filed suit pursuant to 42 U.S.C. §1983 against John T. Campbell, Secretary of State for South Carolina; Carroll Campbell, Governor of South Carolina; and Earle Morris, Comptroller General of South Carolina, all acting in their official capacities. The SCEA

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1 South Carolina Code §§8-11-83, 8-11-91 to 8-11-98.

asserted that it had been deprived of First and Fourteenth Amendment rights under these state laws.

The series of events giving rise to this action began in May 1979 when the Attorney General of South Carolina issued a nonbinding opinion that no public body could provide voluntary payroll deductions without statutory authorization. In 1981 the South Carolina General Assembly enacted facially neutral legislation which authorized payroll deductions for contributions to charitable organizations[2] but declined to authorize

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2 South Carolina Code § 8-11-92. Qualifying criteria for charitable organizations; Secretary of State to determine eligibility.

A. Nonprofit charitable organizations for which such payroll deductions may be made shall include any nonprofit, eleemosynary corporation, association or organization which

is organized and operated exclusively for charitable, health, or welfare services to the public and meets all of the following qualifications:

(1) Is and continues to be organized and qualified to solicit and operate under the laws of this State, pursuant to Chapter 55 of Title 33;
(2) Provide direct and continuing services to or on behalf of the citizens of the State. For purposes of this section, "direct and continuing services: means: (a) services other than legal advocacy services which are provided directly to and specifically for one individual or one family; or (b) services which are in the nature of medical research; or, (c) services which involve the collection and administration of funds by umbrella organizations for other organizations, all of which qualify under this act;
(3) Is recognized as tax exempt under Section 501(c)(3) of Title 26, United States Code (the Internal Revenue Code of 1954, as amended);
(4) Is not an organization contemplated by Section 501(c)(4), 501(c)(5), or 501(c)(6) of Title 26, United States Code (the Internal Revenue Code of 1954, as

amended) and is not an organization primarily engaged in the propagation of a religious faith or belief; this prohibition shall include, but not be limited to, organizations primarily engaged in lobbying or political activity;

(5) Is operated without discrimination in regard to all persons served, and complies with all requirements of law, including administrative regulations, respecting nondiscrimination and equal opportunity regarding its officers, staff, employees and volunteers;

(6) Has neither a parent organization nor a subsidiary organization which fails to meet qualifications herein contained in items (1) through (5).

B. The Secretary of State shall determine on an annual basis, based upon the applications of nonprofit, charitable organizations and groups of such organizations, those which are eligible to participate in payroll deductions for state-employee contributions. His decision shall be final unless determined by a court of competent jurisdiction to be arbitrary, capricious or unsupported by any credible evidence.

payroll deductions for membership dues to labor organizations or groups which forward the proceeds of deductions to such organizations. Among the groups denied payroll deductions under the legislation was the SCEA

A.

In 1987, the General Assembly passed permanent legislation, following two years of temporary legislation adopted in 1985 and 1986, authorizing payroll deductions for membership dues to the South Carolina State Employees Association ("State Employees Association").[3] The SCEA characterizes

3 South Carolina Code § 8-11-83. Payroll deduction for dues of State Employees' Association.

The Comptroller General and all other state agencies, upon request of employees of the State, shall make deductions from the compensation of the employees for the payment of membership dues for the South Carolina State Employees'

the State Employees Association as a "similarly situated" but "less controversial" organization than the SCEA. The differential treatment as to the statutory authorization for payroll deductions, the SCEA contends, arises from the General Assembly's disdain for the content of the SCEA's speech-related activities and its association with the National Education Association ("NEA"). The district court held that by permitting payroll deductions for

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Association. The Comptroller General and state agencies shall pay over to the association all amounts so collected or withheld. Retirees from a state agency also may have withheld from their state retirement benefits their membership dues for the South Carolina State Employees' Association. No deduction is permitted if the association at any time engages in collective bargaining or encourages its members to strike.

payment of dues to the State Employees Association but denying the same service to the SCEA the General Assembly violated the SCEA's First and Fourteenth Amendment rights. The district court did not nullify the state law, but in effect rewrote it by ordering the state and all school districts to extend payroll deductions to the SCEA and its members.

We find the district court's extensive reliance on the testimony of individual members of the General Assembly as to legislative motive an improper intrusion into the legislative function, and the challenged legislation rationally related to legitimate state interests and does not violate either the First or Fourteenth Amendments. Therefore, we reverse.

I.

Prior to 1981 the only statutorily authorized payroll deductions for public employees in South Carolina were deductions for federal and state income tax, social security, health and life insurance, and the purchase of savings bonds. It was the longstanding practice of some South Carolina school districts and some state agencies, absent statutory authorization, to deduct voluntarily from their employees' paychecks the dues for membership in various organizations including the SCEA and the State Employees Association. The State, however, never withheld SCEA dues for teachers employed directly by the State or state agencies.

In May 1979, the Attorney General of South Carolina issued an opinion advising that payroll deductions by

public bodies without statutory authorization were improper. This opinion had no binding effect and many school districts continued the practice of voluntarily withholding SCEA membership dues.

In 1980, in order to avoid future challenge to this practice, the SCEA sought statutory authorization for payroll deductions by proposing legislation providing such deductions for "professional associations." A bill backed by the SCEA received a favorable report from the Senate Education Committee; and after extended debate on the floor, including a filibuster, it passed the Senate. It was later in the legislative session before the bill reached the House, which adjourned before taking action on the measure. In the Autumn of 1980, the South Carolina

Comptroller General gave notice that he would cease withholding voluntary deductions from employee paychecks unless specifically authorized by statute. Again, this action did not affect the status of SCEA payroll deductions since most SCEA members did not have payroll deductions and were not on the State's payroll. Other nonprofit organizations were directly affected, including the United Way and Good Health Appeal.

Bills were introduced before the 1981 legislative session to provide for payroll deductions for charitable organizations. While these bills were pending in the South Carolina legislature amendments were introduced to authorize or require school districts to provide payroll deductions for professional associations. The House

eventually adopted a proposal providing payroll deductions for charitable organizations, credit unions, and professional associations. The House bill included an amendment (the Marchant Amendment),[4] adopted following spirited debate, which prohibited payroll deduction benefits for any entity classified as a labor organization under federal tax or labor law, or which

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4 The Marchant Amendment provided as follows:

> Section 3. Notwithstanding any other provision of this act, including definitions of organizations eligible for payroll deductions, such provisions shall not be construed to include any organization recognized or classified as a labor organization under Section 501(c)(5) of Title 26 of the United States Code Annotated, by the United States Department of Labor, or by any court of competent jurisdiction nor shall any such deduction be made if any of the proceeds of the deduction would be for the benefit of any such organization.

forwarded the proceeds of payroll deductions to such an organization. The companion bill in the Senate, introduced by Senator Heyward McDonald, specifically provided for payroll deductions for the United Way and Good Health Appeal. The legislation was eventually redrafted to permit payroll deductions for contributions to charitable organizations which met six eligibility criteria. This proposal had the effect of foreclosing payroll deduction services to the SCEA, the State Employees Association, and all professional associations representing state employees. Other amendments proposed to permit payroll deductions for payment of dues to professional association were narrowly defeated.

A conference committee was appointed to reconcile the House and

Senate bills. A couple of conference reports were rejected before language acceptable to both the House and Senate was adopted. The legislation eventually emerged as passed by the Senate, but included the House amendment pertaining to labor organizations. The bill was passed by the General Assembly and signed into law in June 1981.

Following the enactment of the 1981 legislation the school districts discontinued deducting SCEA dues from their employees' paychecks. The SCEA contends that "[t]his sudden and uniform loss of payroll deduction across the State had a devastating effect upon the SCEA's membership, financial standing and advocacy program." According to testimony before the district court, however, the SCEA had experienced a steady drop in membership since 1975,

long before termination of payroll deductions services. Appellants suggest that declining membership was the result of internal organizational problems, increasing membership dues, competition from a rival education association, and controversial positions adopted by the SCEA.

In 1985, the State Employees Association began lobbying the South Carolina legislature to obtain payroll deductions for its members. The State Employees Association is a general interest organization open to all individuals employed directly by the state, regardless of their job classification or occupation. Members of the SCEA, with the exception of a few teachers employed directly by state agencies, are not state employees; rather, they are employed by individual

school districts. The State Employees Association actively lobbies the state legislature on issues concerning state employment, and it provides a wide range of services to its members. The State Employees Association, unlike the SCEA, is not affiliated with any national organization. In response to the State Employees Association's lobbying efforts a provision to the 1985 South Carolina Appropriations Act was introduced to authorize payroll deductions for the State Employees Association.

After extensive and heated legislative debate, temporary authorization was approved by the Senate after a tie vote was broken by the Lieutenant Governor. The measure included an amendment which provided that payroll deductions would be terminated if the State Employees

Association engaged in collective bargaining or advocated a strike of state employees. The temporary authorization was renewed n the 1986 Appropriations Act. In 1987, permanent legislation was introduced which specifically authorized payroll deductions for State Employees Association dues. This legislation passed the House and Senate, and it was submitted to Governor Carroll Campbell, who allowed the bill to become law without his signature, but the Governor noted he would look with great disfavor on any new legislation in this area.

When the State Employees Association sought statutory authority for payroll deductions, the issue of payroll deductions for the SCEA or any other professional association or organization was not before the

legislature. The State Employees Association is the only organization granted an exception to the general statutory scheme established in 1981 for charities, credit unions and other financial institutions.

The SCEA initiated the present action in 1987, alleging that the 1981, 1985, 1986 and 1987 statutory provisions constituted violations of its First and Fourteenth Amendment rights by denying the SCEA a benefit extended to the "similarly situated" State Employees Association. The district court found that the 1985, 1986 and 1987 granting of payroll deductions to the State Employees Association confirmed the legislature's unlawful intention in 1981 to retaliate against the SCEA for its speech-related activities and constituted a denial of equal protection

under the Fourteenth Amendment, and also a denial of SCEA's First Amendment Rights.

II.

The SCEA contends that the challenged statutory scheme authorizing payroll deductions was specifically tailored to exclude the SCEA from enjoying the valuable benefit of payroll deductions. This action, according to the SCEA, was motivated by the General Assembly's displeasure with the SCEA's speech-related activities and its affiliation with the NEA. Moreover, this intent was confirmed by the 1987 legislation extending payroll deduction benefits to the State Employees Association which the SCEA characterizes as a "similarly-situated but less controversial group." The SCEA's contention rests on the assumption that

when membership dues are not withheld from wages, members are less likely to pay their dues and the association is impaired in its lobbying activities, legal advocacy program and other services. The SCEA thus positions its claim at the intersection of the First Amendment's protection of free speech and association and the equal protection clause's requirement that government afford like treatment to similarly situated parties.

A.

Neither party disputes that the state is empowered to legislate in the area of payroll deductions for public employees. It is also uncontested that there is no constitutional right to payroll deductions. City of Charlotte v. Local 660, International Association of Firefighters, 426 U.S. 283, 96 S.Ct.

2036, 48 L.Ed.2d 636 (1976). Contrary to the thrust of the SCEA's argument, the challenged 1981 legislation did not terminate payroll deductions for the SCEA per se. The General Assembly merely declined to extend statutory authorization for these services. This legislation, neutral on its face, stemmed from the opinion of the South Carolina Attorney General, and it impacted equally a number of professional associations.

The SCEA's First Amendment claim is not founded on any direct impact the legislation has on free speech or the free flow of information. Rather, it rests on the alleged anti-SCEA motivation of the General Assembly in not authorizing withholding for SCEA membership dues. The legislation in question is facially neutral and merely

defines the type of deductions the state will authorize from the paychecks of state employees. This legislation does not prohibit, regulate, or restrict the right of the SCEA or any other organization to associate, to solicit members, to express its views, to publish or disseminate material, to engage in political activities, or to affiliate or cooperate with other groups. The burden, identified by the SCEA, is the loss of dues from members who might have paid, if a more convenient method of collecting dues was available. The SCEA attempts to construct a First Amendment claim by arguing, in essence, that revenues raised through a payroll deduction arrangement would have been available to further the SCEA's speech-related activities.

Although loss of payroll deductions may economically burden the SCEA and thereby impair its effectiveness, such a burden is not constitutionally impermissible. As the Supreme Court recently stated in response to a free speech claim of an organization denied tax exempt status:

> We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. Id., at 93-108, 96 S.Ct. at 670-677....

The reasoning of these decisions is simple: "although government may not place obstacles in the path of a

[person's] exercise of ... freedom of [speech], it need not remove those not of its own creation." Harris [v. McRae], 448 U.S. [297, 316, 100 S.Ct. 2671, 2688, 65 L.Ed.2d 784 (1980)]. Although [appellee] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." Id., at 318, 100 S.Ct. at 2688. Regan v. Taxation With Representation of Washington, 461 U.S. 540, 549-550, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983). See also Smith v. Arkansas State Highway Employes, 441 U.S. 463, 465-466, 99 S.Ct. 1826, 1828, 60 L.Ed.2d 360 (1979) (First Amendment does not impose any affirmative obligation on public

employer to listen, to respond or to recognize union even if such failure tends to impair or undermine the effectiveness of the union); Arkansas State Highway Employees Local 1315 v. Kell, 628 F.2d 1099, 1102 (8th Cir. 1980)(while the First Amendment protects the right to associate with others and the right of an association to engage in advocacy on behalf of its members, the First Amendment does not impose any duty on a public employer to assist affirmatively - by granting payroll deductions - or reorganize a union, even if failure to do so impairs the union's effectiveness); Local 995, International Association of Firefighters v. City of Richmond, 415 F.Supp. 325 (E.D. Va. 1976)(city's refusal to withhold union dues from fire fighters' paychecks does not violate union's First Amendment

rights, even if such refusal could be said to have impaired union's organizational activities).

While we acknowledge that the First Amendment guarantees the right of association to express any ideas and to engage in advocacy on behalf of its members, the First Amendment does not impose an affirmative obligation on the state to assist the program of the association by providing payroll deduction services. Loss of payroll deductions, it is true, may tend to impair the effectiveness of the SCEA in representing its members, but we hold that such "impairment," like that in Smith, supra, is not one that the First Amendment proscribes. See Smith, 441 U.S. at 465, 99 S.Ct. at 1828. The state's failure to authorize payroll deductions for the SCEA does not deny

SCEA members the right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views. Thus, we find no cognizable constitutional claim pursuant to the First Amendment.

The district court did not assert that the challenged legislation violated the First Amendment based on a showing that it directly inhibited free speech or association; rather, the First Amendment violation arose from the alleged subjective motivation of the South Carolina legislature. South Carolina Education Association v. Campbell, 697 F.Supp. 908, 918-920 (D.S.C. 1988). The district court concluded that the General Assembly denied the SCEA payroll deduction benefits to retaliate against the SCEA

for its controversial positions and political activities.[5]

The Supreme Court has long recognized that judicial inquiries into legislative motivation are to be avoided. Such inquiries endanger the separation of powers doctrine, representing a substantial judicial "intrusion into the workings of other branches of government." Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 268 n. 18, 97 S.Ct. 555, 565 n. 18, 50 L.Ed.2d 450 (1977).

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5 In Kell, supra, the district court concluded, and the Court of Appeals affirmed, that "even a retaliatory termination of the deduction of union dues would not infringe appellees' First Amendment rights, nor would it constitute an unpermitted discrimination in violation of the equal protection clause...." Kell, 628 F.2d at 1102.

Chief Justice John Marshall, in 1810, recognized the principle that the judiciary may not look to legislative motivation to invalidate state statutes. The Court declined to overturn a Georgia statute on the ground that its enactment had been procured by bribing the legislators. Chief Justice Marshall said for the Court:

> It may well be doubted, how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption? or would interest or undue influence of any king be sufficient? Must the vitiating cause operate on a majority? or on what number of the members? Would the act be null,

> whatever might be the wish of the nation? or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130, 3 L.Ed. 162 (1810).

More recently the Supreme Court upheld a congressional act punishing the destruction of draft cards which was challenged as having for its purpose the suppression of free speech. Chief Justice Earl Warren, speaking for the Court, stated:

> it is a familiar principle of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive ...inquiries into congressional motives or purposes are a hazardous matter. when the issue is simply the interpretation of legislation, the court will look

> to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading congress' purpose. it is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of congressmen said about it. what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. we decline to void essentially on the ground that it is unwise legislation which congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

United States v. O'Brien, 391 U.S. 367, 383-384, 88 S.Ct. 1673, 1682-1683, 20 L.Ed.2d 672 (1968)(footnote omitted). See also Palmer v. Thompson, 403 U.S. 217, 224-26, 91 S.Ct. 1940, 1944-46, 29 L.Ed.2d 438 (1971); McCray v. United States, 195 U.S. 27, 53-59, 24 S.Ct. 769, 775-78, 49 L.Ed. 78 (1904).

This Court, sitting en banc addressed the issue of judicial inquiry into legislative motive in Holt v. City of Richmond, 459 F.2d 1093 (4th Cir.), cert. denied, 408 U.S. 931, 92 S.Ct. 2510, 33 L.Ed.2d 343 (1972). The plaintiffs in this case challenged an annexation agreement between the City of Richmond and a neighboring county claiming that it was motivated by a desire to deny blacks within the city a racial majority and the opportunity to gain additional representation on city council. We stated: "[w]hen the legislative purpose is not both obvious and constitutionally impermissible, however, the cases uniformly hold that facially constitutional legislation may not be stricken because of suspect legislative motivation." Id. 459 F.2d at 1098. We further opined that where

legitimate reasons exist for the challenged action "it far surpasses judicial power to strike down legislative action because some of the legislators may have been motivated by some impermissible reason in addition to those acknowledged permissible and legitimate reasons." Id. at 1099=1100.

Similarly, in Wall Distributors, Inc. v. City of Newport News, Virginia, 782 F.2d 1165 (4th Cir. 1986), we declined in the context of a First Amendment case to speculate on the motives of lawmakers. The plaintiff challenged a local ordinance which restricted the exhibition of films in closed booths. The plaintiff asserted that "the sole motive for [the ordinance's] adoption was that of suppressing erotic materials Id. at 1170. We, again relying on O'Brien,

refrained from engaging in an inquiry into legislative motive:

> [T]he O'Brien test requires that the government interest not be related to suppression of free expression. Under this element, courts must "eschew altogether the 'guesswork' of speculating about the motive of lawmakers." Hart [Book Stores, Inc. v. Edmisten], 612 F.2d [821, 829 (4th Cir. 1979)]. Instead, courts must look only to the face of the regulation and the identifiable interest advanced to justify the regulation. Id. On its face and under the interests advanced by the City, the open booth regulation is designed to promote public welfare by preventing unsanitary, offensive or dangerous conditions in arcades. Although [appellant] protests that only "adult" movies are impacted by the regulation, clearly demonstrating that the sole motive for its adoption was that of suppressing erotic materials, so to conclude would involve precisely the type of speculation into legislative motive that we must avoid in assessing this type of constitutional challenge to legislation. We therefore decline to look past the facially apparent effect of the regulation and the interest based purpose advanced for its adoption by the City.

Id. at 1170.

We acknowledge, as the Supreme Court noted in O'Brien, that there are limited exceptions to the principle that judicial inquiry into legislative motive is to be avoided. These exceptions include cases in which "the very nature of the constitutional question requires an inquiry into legislative purpose." O'Brien, 391 U.S. at 383 n. 30, 88 S.Ct. at 1682 n. 30. Such exceptions include race and sex discrimination cases[6] and

6 The Supreme Court has indicated that in adjudicating constitutional challenges to governmental actions on the grounds of race or sex discrimination more than evidence of disproportionate impact on a minority is required to find the action unconstitutional. Therefore, proof of specific discriminatory intent or motive is also necessary. See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-265, 97 S.Ct. 555, 562-563, 50 L.Ed.2d 450 (1977)(race discrimination); Washington v. Davis, 426 U.S. 229, 242-243, 96 S.Ct. 2040, 2048-2049, 48 L.Ed.2d 597 (1976) (same); Personnel

establishment of religion cases,[7] as well as cases challenging statutes which on their face directly inhibit or have the inevitable effect of inhibiting

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Administrator of Massachusetts v. Feeney, 442 U.S. 256, 274-275, 99 S.Ct. 2282, 2293-94, 60 L.Ed.2d 870 (1979)(sex discrimination). While legislative motive is not the sole basis for striking down a legislative enactment, it may be relevant insofar as the Court has held that unlawful motive is a specific element of the test of constitutionality.

7 The constitutional test articulated by the Court for controversies arising under the First Amendment establishment of religion clause is a three-pronged test. Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), the first of which is that "the legislature must have adopted the law with a secular purpose." Edwards v. Aguillard, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987). See also Wallace v. Jaffree, 472 U.S. 38, 56-61, 105 S.Ct. 2479, 2489-92, 86 L.Ed.2d 29 (1985); Eperson v. Arkansas, 393 U.S. 97, 109, 89 S.Ct. 266, 273, 21 L.Ed.2d 228 (1968).

freedom of speech or related constitutional rights.[8] Motive is thus relevant in these cases only insofar as the Courts have expressly deemed it a

8 Legislative motive, in the context of First Amendment controversies, may be relevant when the challenged legislation has on its face some content-based, direct inhibiting effect on freedom of speech or some other expressive activity or enterprise. See, e.g., Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983); Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); FCC v. League of Women Voters of California, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984); Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed2d, 333 (1988); Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982); News America Publishing, Inc. v. FCC, 844 F.2d 800 (D.C.Cir. 1988).

substantive element of the test of constitutionality.

The challenged legislation in the case at bar is clearly not among the limited and well defined exceptions to the principle discouraging judicial inquiry into legislative motive. The 1981 legislation only defines the types of deductions the state will authorize from the paychecks of state employees and does not restrict, on its face, the First Amendment rights of the SCEA to solicit members, to speak in open fora, to associate with any other organization, to engage in political activities, or to otherwise represent its members.

We hold that the district court erred in admitting, over the appellants' objections, the testimony of present and past members of the General Assembly as

to legislative motive. The Supreme Court has counseled that placing decisionmakers on the stand in order to uncover the motivation behind an official action is "usually to be avoided." Village of Arlington Heights, 429 U.S. at 268 n. 18, 97 S.Ct. at 565 n. 18, quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971).

The district court also failed to give due deference to state rules regarding competent evidence of legislative intent. Minnesota Commissioner of Revenue, 460 U.S. 575, 580 n. 3, 103 S.Ct. 1365, 1369 n. 3, 75 L.Ed.2d 295 (1983). The testimony of legislators is not evidence of legislative intent under South Carolina law. In Tallevast v. Kaminski, 146 S.C.

225, 236, 143 S.E. 796, 799 (1928), the South Carolina Supreme Court stated:

> It is a settled principle in the interpretation of statutes that even where there is some ambiguity or uncertainty in the language used, resort cannot be had to the opinions of legislators or of others concerned in the enactment of the law for the purpose of ascertaining the intent of the Legislature. To resort to the views of individuals, even of legislators, after the legislation has been enacted, would involve the interpretation of the law in endless confusion and uncertainty.

See also Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 371, 20 S.E.2d 813, 817 (1984).

Attendant to the enactments of a state legislature is a "strong presumption of validity and constitutionality." Barwick v. Celotex Corp., 736 F.2d 946, 955 (4th Cir. 1984). When adjudicating the constitutionality of an act of a state legislature, the Supreme Court has

acknowledged it "must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.'" Rostker v. Goldberg, 453 U.S. 57,64, 101 S.Ct. 2646, 2651, 69 L.Ed.2d 478 (1981), quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 164, 71 S.Ct. 624, 644, 95 L.Ed.2d 817 (1951)(Frankfurter, J., concurring).

The district court held, citing Village of Arlington Heights, supra, that to establish the presence of an unconstitutional content-based governmental action, the SCEA need not show that the decision was "motivated solely by a single concern, or even that

a particular purpose was the 'dominant' or 'primary' one." Village of Arlington Heights, 429 U.S. at 265, 97 S.Ct. at 563. The SCEA, the district court ruled, need only show that the legislature acted at least in part for the purpose of accomplishing the unconstitutional and adverse effects. SCEA, 697 F.Supp. at 918. This holding is incompatible with recent instructions from the Supreme Court. For example, in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Court reviewed a zoning regulation which restricted the location of adult theaters. Because the regulation was based on content, the Court had to consider whether this "time, place, and manner" regulation was reasonable and "unrelated to the suppression of free expression." Id. at

48, 106 S.Ct. at 929. The Court concluded that the regulation was unrelated to the suppression of free expression. In rejecting the free speech claim, the Court stated:

> According to the Court of Appeals, if "a motivating factor" in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision.... This view of the law was rejected in United States v. O'Brien, 391 U.S. at 382-386, 88 S.Ct. at 1681-1684.

Id. at 47, 106 S.Ct. at 929. Thus, in cases where motive is deemed relevant, the Court has instructed that more than merely "a motivating factor" which is illicit is necessary to invalidate an otherwise constitutional statute.

Although they are not to be considered controlling, legislative debates have been frequently deemed

appropriate sources of information from which courts can ascertain the history of the period in which a statute was enacted and the concerns which the statute was intended to address, and thus cast light upon a statute's proper interpretation. But this is quite different from what we are asked to do in the case at bar. Appellees instruct us to look beyond facially neutral legislation and in reliance upon the opinions of selected members of the South Carolina General Assembly, as recollected in the dock by legislators long after the challenged statute was debated, divine an unconstitutional legislative motive behind the challenged legislation. It is manifestly impossible to determine with certainty the motivation of a legislative body by resorting to the utterances of

individual members thereof - even statements made by sponsors and authors of the act[9] - since there is no way of knowing why those, who did not speak, may have supported or opposed the legislation. United States v. Trans-Missouri Freight Association, 166 U.S. 290, 318-319, 17 S.Ct. 540, 550, 41 L.Ed. 1007 (1897).

Musing on the difficulty of divining subjective legislative motivation, Justice Antonin Scalia opined that

> discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite.... [The legislator]

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9 Jennison v. Kirk, 98 U.S. 453, 459-460, 25 L.Ed. 240 (1878) ("statements of the author of the act in advocating [a statute's] adoption cannot, of course, control its construction").

> may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been made at his wife who opposed the bill, or he may have been intoxicated and utterly un motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for the sole purpose of even a single legislator is probably to look for something that does not exist.

Edwards v. Aguillard, 482 U.S. 578, 636-637, 107 S.Ct. 2573, 2605, 96 L.Ed.2d 510 (1987)(Scalia, J., dissenting). See

also Aldridge v. Williams, 44 U.S. (3 Howard) 9, 24, 11 L.Ed. 469 (1845) (references to the motives of individual members of legislature enacting a statute are uniformly disregarded for interpretative purposes except as expressed in the statute itself); Wallace v. Jaffree, 472 U.S. 38, 74, 105 S.Ct. 2479, 2499, 86 L.Ed.2d 931, 935 (2d Cir. 1984)(isolated remarks in legislative debate are entitled to little or no weight, particularly when they are unclear or conflict with other comments); In re Kelly, 841 F.2d 908, 912 n. 3 (9th Cir. 1988)("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely."); In re Carlson, 292 F.Supp.

778, 783 (C.D.Cal. 1968)("In the course of oral argument on the Senate Floor, the choice of words by a Senator is not always accurate or exact. For this reason, courts have held that statements in debate are not a proper measure of the contents of a statute.").

The case at bar illustrates the hazards of delving into legislative intent or motive and attributing unconstitutional motives to state legislatures. It is axiomatic that if motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant. Aldridge v. Williams, 44 U.S. (3 Howard) 9, 24, 11 L.Ed. 469 (1845). The South Carolina General Assembly has 124 House members and 46 Senators. Sixteen present and past legislators, were

called to testify in the district court. They were examined on the content of their speeches at the statements made by colleagues in the legislative chamber. They were quizzed about their motives in supporting or opposing various legislative actions, and some were even asked to speculate about the motives of colleagues. Such an inquiry is inimical to the independence of the legislative branch and inconsistent with the constitutional concept of separation of powers. Moreover, probing inquiries by federal courts into the motivations of legislatures by calling representatives to testify concerning their motivations and those of their colleagues will doubtlessly have a chilling effect on the legislative process. The testimony indicated that in the 1980 legislative

session only three Senators[10] were identified as making comments adverse to the SCEA, and in the 1981 session five senators[11] and two Representatives[12] spoke against the SCEA. The record is silent as to whether the views of these nine legislators actually reflected the sentiments of the legislature as a whole or persuaded others to adopt the challenged legislation.

In the case at bar, legislators testified to multiple legitimate reasons why they endorsed the challenged legislation. For example, Senator John Drummond, identified as a leading

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10 Senators John Drummond, Charles Garrett, and Gilbert McMillan.

11 Senators John Drummond, Norma Russell, Arthur Ravenel, Marion Gressette, and Glenn McConnell.

12 Representatives Thomas Marchant and Larry Koon.

opponent of the SCEA, testified that he opposed the deductions because he recalled his childhood as one of seven children of an impoverished textile worker whose paycheck was frequently consumed by deductions to the company store. Drummond, incidentally, also voted against deductions for the State Employees Association. A number of legislators testified at trial that they voted against dues deductions for professional associations, despite amicable relations with the SCEA, because they were opposed to the state expending time and money arranging payroll deductions for any organization.

Determining the subjective intent of legislators and the collective motivation of legislatures is a perilous enterprise indeed. The legislative record is manifestly sparse and

contradictory, and "the stakes," as the O'Brien Court counseled, "are sufficiently high for us to eschew guesswork." O'Brien, 391 U.S. at 384, 88 S.Ct. at 1683. We, therefore, conclude that the district court's imputation to the General Assembly of the apparent motivations of a few voluble legislators[13] and general reliance on the testimony of select legislators was inappropriate under both state and federal rules of statutory construction.

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13 See News America Publishing, Inc. v. FCC, 844 F.2d 800, 810 n. 12 (D.C.Cir. 1988)("Any judicial use of legislators' remarks for imputing an unconstitutional motive to the legislative majority (as opposed to merely inferring the intended meaning of ambiguous legislation) raises troubling questions").

In addition to arguing that the challenged 1981 legislation depriving the SCEA of payroll deductions was unconstitutionally motivated by the General Assembly's displeasure with its speech-related activities, the SCEA contends that its equal protection rights were violated by the granting of statutory authorization for payroll deduction benefits to a "similarly situated" employee organization. Such differential treatment, it is argued, renders the law irrational under the equal protection clause. The district court incorrectly concluded that the state had abridged fundamental free speech and association rights of the SCEA and, therefore, applied the "strict scrutiny" standard to the state's actions. SCEA, 697 F.Supp. at 917. Ascertaining no "compelling state

interest," the district court found the challenged statutory scheme violative of the Fourteenth Amendment. Id. at 920.

As discussed above, we hold the district court erred in finding that the challenged legislation impermissibly prohibited, regulated or restricted the SCEA's free speech and association rights. Therefore, the General Assembly's refusal to authorize payroll deductions to professional associations and subsequent decision to extend such services to the State Employees Association need only be rationally related to the furtherance of a legitimate governmental interest. See City of Charlotte, 426 U.S. at 286, 96 S.Ct. at 2038-39. See also Regan, 461 U.S. at 549, 103 S.Ct. at 2002-03 (legislature's decision not to subsidize an organization does not infringe First

Amendment rights and is not subject to strict scrutiny).[14]

The 1981 legislation, according to testimony before the district court, was not targeted solely at the SCEA. The principal draftsman of the six part test of the 1981 legislation, Senator Heyward McDonald, noted that it was directed at and impacted organizations in addition

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14 It should be noted that the Supreme Court has specifically rejected an inquiry into motive in an equal protection claim:

> Petitioners have also argued that respondents' action violates the Equal Protection Clause because the decision to close the pools was motivated by a desire to avoid integration of the races. But no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.

Palmer v. Thompson, 403 U.S. 217, 224, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971).

to the SCEA. It is readily apparent that the 1981 legislation declined to authorize payroll deductions for all professional associations representing state employees, such as the South Carolina Law Enforcement Officers Association, the South Carolina Association of Social Workers, and the South Carolina Environmental Workers Association. Indeed, even the State Employees Association was denied payroll deduction services under the 1981 legislation and only gained authorization for deductions after lobbying the legislature in 1985, 1986 and 1987. Unlike the State Employees Association, the SCEA, significantly, has made no legislative effort to obtain payroll deductions since 1981.[15]

15 The SCEA also contends, and the district court found, that the General Assembly's action granting

In City of Charlotte, which involved the refusal of a municipality to withhold union dues, the Supreme Court held that a policy of allowing payroll deductions only when it benefits all employees is not so devoid of reason as to violate the equal protection clause and is a legitimate method for avoiding the burden of withholding money for all persons or organizations that

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payroll deduction to the State Employees Association in 1985 evidences its unlawful intent to discriminate against the SCEA four years earlier. SCEA, 697 F.Supp. at 919. This conclusion, however, ignores the fact that the SCEA did not seek statutory authorization for payroll deductions in 1985, 1986 or 1987. It is particularly hazardous to infer the intent and motivation of one legislative body from the actions of a subsequent session of the same legislative body. See South Carolina v. Regan, 465 U.S. 367, 379-380 n. 17, 104 S.Ct. 1107, 1114-1115 n. 17, 79 L.Ed. 372 (1984).

request payroll deductions. The Court held that disparate treatment in authorizing payroll deductions "must meet only a relatively relaxed standard of reasonableness in order to survive constitutional scrutiny." City of Charlotte, 426 U.S. at 286, 96 S.Ct. at 2038. In an equal protection case of this type, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Vance v. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979).

There are several apparent legitimate bases for the classification in the case a bar. It would be unduly burdensome and expensive -

administratively and financially - for the State and its political subdivisions to withhold membership dues for every organization that requests it. Furthermore, the State, as employer, has a legitimate interest in enacting legislation which is a potential benefit to all State employees. The State has an interest in fostering good employer-employee relations and improving morale among the State's employees, which is arguably advanced by authorizing payroll deductions for the State Employees Association. The State Employees Association is a "general interest" association open to all State employees without regard to occupation or job classification. Although other professional associations represent State workers, none define their membership as broadly or their objective

as comprehensively at the State Employees Association. The SCEA, on the other hand, is a "special interest" association open only to individuals employed n the South Carolina public education system. The SCEA's focus is on education-related issues arising from the special interests of its members. Moreover, most SCEA members are not State employee, but are employed by school districts which are semi-autonomous political subdivisions of the State.

The State's decision in this instance to treat the State Employees Association as a general interest group differently from programs of special interest does not appear "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions

were irrational." Vance v. Bradley, 440 U.S. at 97, 99 S.Ct. at 943. As the Court concluded in City of Charlotte:

> We cannot say that denying withholding to associational or special interest groups that claim only some departmental employees as members and that employees must first join before being eligible to participate in the checkoff marks an arbitrary line so devoid of reason as to violate the Equal Protection Clause. Rather, this division seems a reasonable method for providing the benefit of withholding to employees in their status as employees, while limiting the number of instances of withholding and the financial and administrative burdens attendant thereon.

City of Charlotte, 426 U.S. at 288, 96 S.Ct. at 2039-2040. The Court further observed that even if the burden of authorizing deductions for the union was minimal by itself, the city was entitled to draw lines "in order to avoid the cumulative burden of processing

deductions every time a request is made." Id.

Since the actions of the General Assembly in the case at bar were reasonable and based on rational distinctions between employee groups and between the employers involved, we find there was no violation of the equal protection clause when the legislature gave the State Employees Association the benefit of payroll deductions. Therefore, the district court's order finding a Fourteenth Amendment violation is reversed.

III.

We, therefore, conclude that the challenged statutory scheme does not, on its face, impermissibly burden the SCEA's speech and associational rights under the First Amendment, and, absent abridgement of such fundamental

interests the district court erred in admitting the trial testimony of past and present members of the South Carolina General Assembly as evidence of an allegedly illicit legislative motive, and in finding that the legislation violated the First Amendment. We further find that the challenged legislative enactments were reasonably based on rational distinctions; consequently, the equal protection claim must also fail.

Accordingly, the order of the district court is REVERSED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

* * *

CIVIL ACTION NO. 3:87-2838-0

* * *

SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM, and MICHAEL T. HOLLIFIELD,

Plaintiffs,

-vs-

JOHN T. CAMPBELL, in his official capacity as Secretary of State of South Carolina; CARROLL CAMPBELL, in in his official capacity as Governor of the state of South Carolina; and EARLE MORRIS, in his official capacity as Comptroller General of the State of South Carolina,

Defendants.

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This action involves a challenge by plaintiffs, the South Carolina Education Association ("SEC") and various members

of the SCEA, to a statutory scheme[2] they assert was designed to deny the SCEA payroll deduction benefits because of the content of the organization's speech-related activities, while permitting a similarly situated employee organization, the South Carolina State Employees Association ("State Employees Association"), to enjoy such payroll deduction benefits. Plaintiffs assert that this differential treatment on the basis of the content of the SCEA's speech-related activities is violative of their rights under the First and Fourteenth Amendments of the United States Constitution. The Court tried this matter without a jury and makes the

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2 South Carolina Code Section 8-11-83, 8-11-91 to 98.

following finding of fact and conclusions of law.

**FINDING OF FACT**

1. The SCEA is an unincorporated association of teachers, school administrators, guidance counselors, teacher aides and other educational personnel. All public school employees, from the superintendent to the custodian, are eligible for SCEA membership. The SCEA is classified under federal tax law as a "business league" under 26 U.S.C. § 501(c)(6).

2. The SCEA is an affiliate of the National Education Association ("NEA"), a Washington, D.C. based organization which was organized under a charter issued by the United States Congress. Under the rules of the SCEA,

a person desiring to join the state organization must also join a local affiliate and the NEA. The NEA is classified under federal tax law as a "labor organization" under 26 U.S.C. § 501(c)(5).

3. Prior to June 30, 1981, the SCEA collected a substantial portion of its dues through voluntary payroll deductions from approximately two-thirds of the school districts in South Carolina. The SCEA had a membership in excess of 18,000 during the 1980-81 school year.

4. The SCEA has been actively engaged in the political arena in recent years, advocating a broad range of legislative initiatives and endorsing through its political action committee

candidates for state and federal legislative and executive offices. Some of the organization's positions, such as its advocacy of a change in the State's public policy against collective bargaining in the public sector and for adoption of the Equal Rights Amendment, have been considered controversial by some members of the South Carolina General Assembly.

5. In November 1973 the Attorney General of South Carolina concluded that no public body could provide voluntary payroll deductions without statutory authorization. The Attorney General's opinion, which had no binding effect, did not result in any significant change in the long standing practices of school

districts of providing payroll deduction benefits for SCEA dues.

6. In order to secure its long-standing use of payroll deduction benefits, the SCEA sought legislative authorization for payroll deduction in 1980. The proposal, which provided for payroll deduction for "professional associations," received approval from the Senate Education Committee. The bill faced serious opposition on the Senate floor, however. In the course of the extended Senate debate during the 1980 legislative session, which included a filibuster by Senator John Drummond for over 20 hours, the SCEA found itself the focus of repeated attacks on its legislative agenda, its affiliation with the NEA and its leadership. During his

remarks on the floor of the Senate, Senator Drummond read extensively from SCEA publications, attacked the practices and philosophy of the NEA and made personal references to the SCEA's Executive Director and Assistant Executive Director. Senator Charles Garrett criticized the SCEA's affiliation with the NEA and characterized the SCEA as a liberal organization and labor union. Senator Gilbert McMillan suggested in the floor debate that because of the organization's philosophy, its president, Mrs. Elaine Marks, should spell her name "Marx." After extensive consideration of the matter, the Senate voted on April 29, 1980 to authorize voluntary payroll deduction of

professional association dues. The matter was then sent to the House where, because of the lateness in the session, no action was taken on the bill before the General Assembly adjourned.3

7. Prior to the opening of the 1981 General Assembly, South Carolina Comptroller General Earle Morris announced that if the General Assembly did not promptly provide statutory authorization for payroll deductions he would cease withholding unauthorized voluntary deductions from State employee paychecks. Although SCEA payroll

3 Since the 1980 legislative session was the end of a two year legislative cycle, the payroll deduction legislation died upon adjournment and any further legislation was required to begin anew in the House and the Senate in 1981.

deduction benefits were not directly affected by the Comptroller General's threatened action,[4] other non-profit organizations, such as United Way and Good Health Appeals, faced imminent injury. In December 1980, bills were prefiled in the House and Senate which authorized by name the United Way and Good Health Appeal for payroll deduction benefits.

8. The bill authorizing payroll deduction for the United Way and Good Health Appeal by name came to the floor of the House in late January 1981 and an

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4 SCEA did not have payroll deduction benefits at that time for its members who were State employees, such as teachers at the South Carolina Department of Youth Services school system, Department of Mental Retardation education facilities and the South Carolina School for Deaf and Blind.

effect was made to amend the bill to authorize payroll deduction for professional associations. This amendment triggered a filibuster by Rep. Larry Koon, who, reading from SCEA and NEA materials on the floor of the House, criticized the state association's affiliation with the NEA. During his extended remarks, Rep. Koon attacked the NEA's advocacy of collective bargaining and "liberal" politics and criticized the requirement that a member of the SCEA also join the NEA.

After extended debate, the House adopted an amendment authorizing voluntary deductions for professional association dues. Immediately thereafter, another amendment was offered by Rep. Thomas Marchant which

prohibited payroll deduction benefits for any entity "classified as a labor organization" under federal tax or labor law or which would permit the proceeds of payroll deduction to be forwarded to a labor organization. Rep. Marchant explained during the floor debate that it was his intention to deny payroll deduction benefits to the NEA, which is recognized as a labor organization under federal labor and tax laws, as well as the SCEA, which forwarded a portion of the proceeds of payroll deduction to the NEA. In the course of his remarks, Rep. Marchant attacked the SCEA's "liberal" political philosophy, characterized the organization as a labor union and read from the organization's literature. The

House thereafter adopted the Marchant Amendment.

The House's adoption of both the Marchant Amendment and voluntary payroll deduction for professional associations created some confusion regarding whether the SCEA would be eligible for payroll deduction benefits. While the bill was still before the House and a filibuster was ongoing, Rep. Merchant (sic), wrote South Carolina Attorney General Daniel McLeod on January 30, 1981 requesting an Attorney General's opinion regarding the effect of his amendment. Rep. Marchant explained that the payroll deduction bill had been debated for two weeks "with a major point of concern being opposition to deductions for the South Carolina Education Association." He

further explained that "a new filibuster" was underway by supporters of his amendment "to prevent any deductions going to the SCEA and/or NEA." Attorney General McLoed responded to the opinion request on February 2, 1981, concluding that if SCEA forwarded a portion of its payroll deduction proceeds to the NEA, then "deductions for such payments by school districts to the SCEA would be prohibited. . . ." Rep. Marchant filed this Attorney General's opinion in the House Journal on February 3, 1981 and proponents of the Marchant Amendment immediately relinquished the House floor. The payroll deduction legislation then was adopted by the full House.

9. After House passage of the payroll deduction bill, Rep. Marchant maintained his active interest in SCEA activities. On April 21, 1981, Rep. Marchant wrote then Secretary of Treasury Donald Regan to request a review of SCEA's tax exempt status under 501(C)(6) as a "business league." Rep. Marchant argued, utilizing SCEA literature and various news articles, that the organization should be classified under 501(c)(5) as a "labor organization." The letter was signed by Rep. Marchant as "Assistant Minority Leader" and was hand delivered by Rep. Marchant while he was in Washington for a meeting at the White House. Shortly thereafter, an official of the Internal Revenue Service appeared at the SCEA

building to review the organization's tax exempt status. No change in the organization's status was made after Internal Revenue Service review.[5]

10. After the House passed payroll deduction legislation, the Senate took

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5 Under the House version of the payroll deduction bill, adopted on February 3, 1981, an organization classified as a "labor organization" under 501(c)(5) of the IRS code was ineligible for payroll deduction. Since the SCEA was classified as a "business league" under 501(c)(6), it would be ineligible for payroll deduction benefits under the House bill only if it forwarded a portion of the proceeds of payroll deduction to the NEA, a 501(c)(5) organization. If Rep. Marchant had been successful in obtaining a reclassification of SCEA as a 501(c)(5) organization, it would have automatically made the organization ineligible for payroll deduction benefits under the House bill, regardless of whether the NEA shared in the payroll deduction proceeds.

up consideration of the bill. The key floor leader for the United Way and Good Health Appeal payroll deduction in the Senate, Senator Heyward McDonald, redrafted the bill in committee for the purpose of creating a neutral piece of legislation than would allow payroll deduction for the United Way, Good Health Appeal, credit unions and other financial institutions.[6] The McDonald bill contained a mandatory six part test which had the effect of disqualifying the SCEA from payroll deduction benefits. Senator McDonald explained

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6 An Attorney General's opinion issued January 13, 1981 had raised "serious reservations" regarding the constitutionality of the provisions allowing two organizations to receive "payroll deductions, but excluding all other organizations without exception."

that the opponents of payroll deduction for the SCEA in the Senate were sufficiently strong that if he did not accommodate their wishes the entire bill, including payroll deduction for the United Way and Good Health Appeal, would be defeated.

11. The Senate Medical Affairs Committee took up consideration of Senator McDonald's redrafted bill, S.153. Proponents of payroll deduction for professional associations sought to amend the bill in committee, which sparked a serious debate. Senator Arthur Ravenel, referencing the SCEA's Charleston affiliate
s activities in his 1980 Senate race, described in committee debate the organization as "vicious" and vigorously

argued against payroll deductions for the SCEA. Senators Glen McConnell and Norma Russell also criticized the SCEA during the committee debate. The amendment to authorize payroll deduction for professional associations failed in committee by a 7-7 tie.

12. When the bill went onto the Senate Floor, Senator Robert Dennis offered amendments to the bill to permit either voluntary payroll deduction or the grandfathering of all school districts that had permitted payroll deduction in the past. In the course of the Senate consideration of the Dennis Amendments, the SCEA, its national affiliate and its leadership were subjected to repeated attacks. During the debate, a tabloid published by the

SCEA that identified certain senators for defeat was circulated on the Senate floor and referenced in the debate. An opponent of SCEA payroll deduction, Senator Glenn McConnell, described the tabloid as "exciting" the SCEA opposition.

Senator John Drummond actively participate in the debate by reading from SCEA literature and attacking the organization's affiliation with the NEA. Senator Norma Russell criticized the SCEA's then Executive Director, Dr. John Sullivan, for his salary, which she apparently misinterpreted while reading from the SCEA budget during Senate debate. She also criticized the Association's political endorsement practices and its support of the Equal

Rights Amendment. Senator Marion Gressett criticized the SCEA for its affiliation with the NEA.

The Senate ultimately defeated each Dennis amendment by narrow margins. The bill was then amended to include a prohibition of payroll deduction for any organization that provided direct legal advocacy services to its members.[7] S.153 was then given a third reading and sent to the House.

13. The House refused to concur with the Senate bill and a conference committee of Senators Hyman Rubin, Heyward McDonald and Paul Cantrell and

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7 At that time the SCEA was the sole state-wide organization providing ongoing legal advocacy services for its members.

Reps. Tom Marchant, parker Evatt and Ernest Nunnery was appointed.

14. Although payroll deduction for professional associations had been defeated in both the House and Senate, supporters of the SCEA found the Senate bill contained a provision which potentially permitted SCEA to continue payroll deduction through credit unions.[8] The Conference Committee voted 5-1 to adopt the Senate version of the bill. Rep. Marchant argued that the Senate bill contained a loophole regarding credit union deductions and

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8 The House bill also contained a provision for credit unions but the addition of the Marchant Amendment made that provision unusable for the SCEA. Several local affiliates of the SCEA collected their dues through local teacher credit unions, including the Greenville and Charleston Affiliates.

required the Marchant Amendment to prevent further SCEA payroll deductions. Upon the Conference Committee's rejection of the Marchant Amendment, Rep. Marchant filed a minority report stating that he desired to "insure, without a question, that none of the dues could benefit a labor union."

15. Rep. Marchant urged from the House floor rejection of the Conference Committee report because the absence of his amendment created a loophole for the SCEA. The House thereafter rejected the Conference Report. Senator Norma Russell also urged the Senate to reject the Conference Report, noting that the SCEA's Greenville affiliate collected a substantial portion of its dues through the local teacher's credit union.

Senator McDonald argued for acceptance of the Conference report, asserting that there was already "ten nails in the SCEA coffin" and opponents sought simply to put "thirty screws" in it. The Senate also rejected the first Conference report.

16. The conferees reconvened and adopted a second Conference report, which contained the Senate bill and a portion of the Marchant Amendment which prohibited direct payments to a labor organization. The other portion of the Marchant Amendment, prohibiting payments to any organization which forwarded proceeds of payroll deduction to a labor organization, was not included in the Conference report.[9] Rep. Marchant again

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9 An Attorney General's report of

dissented from the Conference report and the House rejected the second Conference report at Rep. Marchant urging. The Conferees then reconvened, adopted as the third Conference report the Senate bill with the full Marchant Amendment and forwarded the report to the House and Senate. The legislation, thereafter, passed both bodies by large margins and was signed into law by the Governor.

17. As a result of the 1981 legislative action and pursuant to the provisions of the adopted statutes, all school districts which have previously provided payroll deduction to the SCEA

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June 1, 1981 had raised questions concerning the constitutionality of this portion of the Marchant Amendment.

terminated the practice.[10] The SCEA suffered a sudden drop in its

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10 The termination of payroll deduction benefits for the SCEA was based upon the failure of the organization to satisfy the six part test of the statute, which provides:

> A. Nonprofit charitable organizations for which such payroll deductions may be made shall include any nonprofit, eleemosynary corporation, association or organization which is organized and operated exclusively for charitable, health or welfare services to the public and meets all of the following qualifications:
>
> 1. Is and continues to be organized and qualified to solicit and operate under the laws of this State, pursuant to Chapter 55 of Title 33;
>
> 2. Provide direct and continuing services to or on behalf of the citizens of the State. For purposes of this section, "direct and continuing service" means: (a) services other than legal services which are provided directly to and specifically for one individual or one family; or (b) services which

are in the nature of medical research; or, (c) services which involve the collection and administration of funds by umbrella organizations for other organizations, all of which qualify under this act;

3. Is recognized as tax exempt under Section 501(c)(3) of Title 26, United States Code (the Internal Revenue Code of 1954, as amended);

4. Is not an organization contemplated by Section 501(c)(4), 501(c)(4), 501(c)(5) or 501(c)(6) of Title 26, United States Code (the Internal Revenue Code of 1954, as amended) and is not an organization primarily engaged in the propagation of a religious faith or belief; this prohibition shall included, but not be limited to, organizations primarily engaged in lobbying or political activity;

5. Is operated without discrimination in regard to all persons served, and complies with all requirements of law, including administrative regulations, respecting nondiscrimination and equal opportunity regarding its officers, staff, employees and volunteers;

membership, losing in excess of 3,500 members the year following the loss of payroll deductions. This significant single year decline in membership was primarily caused by the loss of payroll deduction benefits.

The SCEA's significant membership loss in the 1981-82 year created a fiscal crisis for the organization, requiring the laying off of staff, reducing the remaining staff temporarily to a four day work week and limiting various meetings and instructional conferences. Further, the SCEA's publications were reduced and its legal advocacy program's budget was cut. The

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6. Has neither a parent organization nor a subsidiary organization which fails to meet qualifications herein contained in items (1) through (5).

SCEA's fiscal instability required its lender to insist on a second mortgage on the SCEA building and the organization was forced into borrowing funds at 21% interest to remain afloat. The SCEA's professional staff, which had previously devoted significant time to handling employee grievances and providing other services to members, were forced to devote their primary energies to maintenance of membership.

18. The South Carolina State Employees Association is an organization of State employees which, like the SCEA, lobbies the South Carolina General Assembly regarding matters of concern to its members and provides various services to its membership, including assistance in employee grievance

matters. The State Employees Association has tended, however, to be a less controversial organization than the SCEA, has not endorsed candidates for public office and has not affiliated with a national organization identified as a labor union. The State Employees Association is classified under federal tax law as a labor organization pursuant to 26 U.S.C. § 501(c)(5).

19. The leadership of the State Employees Association realized prior to the 1985 legislative session that it was experiencing a chronic problem maintaining its membership and would be greatly benefited by the provision of payroll deductions. Under the then existing statutory scheme, the State

Employees Association was ineligible for payroll deductions.

The State Employees Association persuaded supportive legislators to propose an amendment to the 1985 Appropriations Act, which would authorize payroll deductions by name to the organization. The provision was approved by the House and forwarded to the Senate. In the course of the Senate debate, an amendment was proposed by Senator John Courson, which provided that in the event the State Employees Association engaged in collective bargaining or advocated a strike, payroll deduction benefits would be terminated. The Courson Amendment resulted in a 21-21 tie, with Lt. Governor Michael Daniel breaking the tie

in favor of the amendment. The proviso was then approved by the Senate.

Two senators and one House member who supported payroll deductions for the State Employees Association but opposed the benefit for the SCEA acknowledged at trial that the differential treatment afforded was content-based. Arthur Ravenel, a State Senator during legislative consideration of payroll deduction and now a United States Congressman, testified that he supported payroll deduction for the State Employees Association because unlike the SCEA, it was not a labor union and did not engage in political action and endorsement of candidates. Senator Glenn McConnell testified that he supported the effort of the State

Employees Association because it did not affiliate with a union or advocate collective bargaining and was not a political activist organization. He also explained that by providing financial stability through payroll deduction the State Employees Association would not be driven into becoming a union advocating collective bargaining. Senator McConnell also testified that it was in his mind in 1985 not to allow any language in the proviso to permit payroll deduction for the SCEA. Rep. Larry Koon testified that he supported payroll deduction for the State Employees Association because, unlike the SCEA, the organization was not affiliated with a labor union.

20. The 1985 proviso to the Appropriations Act expired at the end of the 1985-86 Fiscal year and was renewed with little discussion in the 1986 Appropriations Act. The proviso was also inserted in the proposed 1987 Appropriations Act but was struck by the Speaker of the House because it was non-germane to the appropriations process. Supporters of payroll deduction for the State Employees Association then drafted an independent piece of legislation, which was given special order consideration by the House Rules Committee and quickly passed the House. The Senate took up the bill without reference to a committee and approved it with little controversy. Governor Campbell allowed the bill to become law

without his signature, explaining in a letter to the Speaker of the House that while he opposed payroll deductions for public employees, the State Employees Association "has been a responsible organization" whose members "want a positive, cooperative employee-employer relationship." The Governor went on to state, however, that "without equivocation" he would "look with great disfavor on any new legislation in his area."[11]

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11 The 1987 legislation, codified as South Carolina Code Section 8-11-83, provides as follows:

> The Comptroller General and all other State agencies, upon request of employees of the State, shall make deductions from the compensation of the employees for the payment of membership dues for the South Carolina State Employees Association. The Comptroller General and State agencies shall pay over to the Association all

21. When the General Assembly adopted the 1981 payroll deduction legislation, the SCEA was the sole employee organization which was then seeking to utilize the benefit. With the provision of payroll deduction benefits to the State Employees Association in 1985, the SCEA is today the only state-wide public employee organization within South Carolina which seeks to obtain payroll deductions and is denied the benefit. Since obtaining payroll deductions benefits in 1985, the

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amounts so collected or withheld. Retirees from a State agency also may have withheld from their State retirement benefits their membership dues for the South Carolina State Employees Association. No deduction is permitted if the Association at any time engages in collective bargaining or encourages its members to strike.

State Employees Association has realized a significant increase in its membership.[12]

CONCLUSIONS OF LAW

1. This case concerns the right of the government to withhold a benefit--payroll deduction--on the basis of the identify or political viewpoint of the potential beneficiary.[13] The United

12 Under the State's statutory scheme for payroll deductions, over 80 organizations, ranging from tax sheltered annuities to credit unions to the South Carolina State Employees Association to various insurance companies, are permitted payroll deduction from State employees paychecks.

13 It is well settled that plaintiffs have no constitutional right to payroll deduction benefits, even in those circumstances where some injury arises to the organization from the simple denial of the benefit. City of Charlotte v. Local 660 International Association of Firefighters, 426 U.S. 283 (1976).

States Supreme Court has long held that any effort to regulate or sanction citizens on the basis of the content of their speech is inherently suspect:

> If there is any fixed star in our constitutional constellation it is that no official, high or low, can proscribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. West VirginiaState Board of Education v. Barnett, 319 U.S.. 624, 642 (1943).

This basic principle, that governmental officials are not free to use their power to impose a burden or deny a benefit for content-based reasons, was recognized in Grosjean v. American Press Company, 297 U.S. 233 (1936). In Grosjean, the State of Louisiana enacted a license tax on all newspapers with weekly circulations

exceeding 20,000. In the course of legislative debate, supporters of the bill accused the affected newspaper of having "ganged up" on the U.S. Senator Huey Long [sic], characterized the papers as "lying newspapers," and asserted that the tax would be "a tax on lying, 2c [cents] a lie." Minneapolis Star and Tribune Company v. [sic] Minnesota Commissioner of Revenue, 460 U.S. 575, 579-80 (1983).[14] The Court, finding no general prohibition or constitutional right of newspapers to be free from taxation, nevertheless

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14 The Supreme Court in Minneapolis Star analyzed the record in Grosjean closely and much of the factual background was only referenced generally in the Grosjean order itself.

rejected the tax motivated by the content of the newspapers' speech:

> The tax here is not bad because it takes money from the pockets of the [newspapers]. If that were all, a wholly different question would be presented. It is bad because, in light of its history and its present setting, it is seen as a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled. . . 270 U.S. at 250. [Emphasis added].

The Supreme Court has affirmed its abhorrence of content-based governmental action in a long line of decisions. In Niemotko v. Maryland, 340 U.S. 260 (1951), the Court rejected a Park Commissioner's denial of a permit to Jehovah Witnesses [sic] due to the content of their speech, holding that "the First and Fourteenth Amendments [have] a firmer foundation than the whims of personal opinions of a local

governmental body." 340 U.S. at 272. In Police Department of Chicago v. Moseley, 408 U.S. 92 (1972), the Court struck down a City of Chicago ordinance which prohibited all forms of picketing in or about a school building except for labor picketing. The Court reasoned:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on the picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from governmental censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the

principle that debate on public issues should be uninhibited, robust and wide open." 408 U.S. at 95-6. [Citation omitted].

See also, Ragen v. Time, Inc. 468 U.S. 641, 648-9 (1984); Arkansas Writer's Project, Inc. v. Ragland, 107, S.Ct. 1722 (1987); FCC v. League of Women Voters of California, 468 U.S. 364, 383-4 (1984); Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1973); Consolidated Edison Company v. Public Service Commission, 447 U.S. 530 (1980); Cary v. Brown, 447 U.S. 455 (1980).

The Supreme Court addressed in a 1985 decision, Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788 (1985), the withholding of payroll deduction benefits for charitable contributions by the government to an organization for

content-based reasons. In Cornelius, the Supreme Court was confronted with the denial of payroll deduction benefits for a charitable organization allegedly on the basis of the content of the NAACP Legal Defense Fund's speech-related activities. The Court, after concluding that the government asserted a reasonable basis to deny payroll deduction in a non-public forum independent of protected conduct, remanded the case to determine if the regulation was "in reality a facade for viewpoint based discrimination." 473 U.S. at 812-813. Justice O'Conner, writing for the majority, held that the government's reasonable justification for denial of payroll deduction "cannot save an exclusion that is in fact base

on the desire to suppress a particular point of view." Ibid.

The Cornelius Court relied on dicta in a previous case, Perry Education Association v. Perry Local [sic] Educators Association, 460 U.S. 37 (1983), which involved the granting of teacher mailbox and inter-school mail privileges exclusively to one employee organization because of its recognition as a bargaining representative for collective bargaining purposes. A rival organization, which had lost the representation election, contended that it was denied equal protection and free speech due to the employer's action. In the course of holding that exclusive payroll deduction benefits for the bargaining representative was not

violative of the Constitution, the Court carefully distinguished this situation from one where the denial was viewpoint based. 460 U.S. at 46-49.

The prohibition against content-based governmental action is not limited to circumstances where the injured party had a constitutional right to the benefit withheld. In Cornelius, the Supreme Court held that even though the NAACP Legal Defense Fund had no constitutional right to charitable solicitation in a non-public forum, the denial of access could not in reality be facade for viewpoint based discrimination. 473 U.S. at 812-13. Similarly, in various cases involving the taxing of newspapers, the Supreme Court has affirmed the government's

general right to raise revenues through the taxing of newspapers and periodicals. E.g., Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1973). Despite the newspapers' absence of First Amendment protection against general taxation, the Court has consistently held content-based taxes to be unconstitutional. Indeed, the United States Supreme Court recently held in Arkansas Writers' Project, Inc. v. Ragland, 107 S.Ct. 1722 (1987), that a State tax applicable only to periodicals that were not of a religious, professional, trade or sports nature, constituted unlawful content-based discrimination.

In summary, the withholding of a benefit or the imposition of a burden for content-based reasons by the government is violative of the First and Fourteenth Amendments of the United States Constitution. This constitutional violation exists even in circumstances where the injured party has no legal right to the benefit or to be free from the burden imposed.

2. Once it is established that government action withholding a benefit or imposing a burden is content-based, "strict scrutiny" analysis must be applied. This requires a showing that the treatment afforded the affected party "is necessary to serve a compelling state interest and is narrowly drawn to serve that end."

Arkansas Writer's Project v. Ragland, 105 S.Ct. at 1728; Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. at 585; Consolidated Edison Company v. Public Service Commission, 447 U.S. at 540.

3. The Supreme Court has also addressed the denial of a government benefit, food stamps, to a politically unpopular group ("hippies" living in communes) under a Fourteenth Amendment analysis in United States Department of Agriculture v. Mareno, 413 U.S. 528 (1973). The Supreme Court, in seeking to identify a legitimate governmental interest to support the classification contained in the statute, held that "if the constitutional concept of 'equal

protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. 413 U.S. at 534.

4. The determination of whether this statutory scheme is, in fact, "a facade for viewpoint based discrimination," Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. at 812-13, requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 255 (1977). While the injury is

practical, the Court must look to "objective factors," such as:

a. Contemporaneous statements by members of the decision-making body;

b. Impact of the governmental action;

c. Legislative history, including reports, opinions, statements asserted into the record at the time of legislative consideration and various drafts of the legislation;

d. Sequence of events leading to the final action;

e. Examination of the statutory language; and

f. Testimony of members regarding the purpose of their action, although post-enactment elucidation of the meaning of the statute for purposes of

justifying the action is give little weight.

Edwards v. Aguillard, 107 S.Ct. 2573, 2579-82 (1987); Wallace v. Jaffree, 107 S.Ct. 2573 (1985); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 n.24 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 564-5; United States v. City of Birmingham, Michigan, 727 F.2d 560, 564 (6th Cir. 1984); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1243 (5th Cir. 1981); Brown v. Board of School Commissioners of Mobile County Alabama, 542 F.Supp. 1049, 1054 (M.D. Ohio 1980).

5. In attempting to establish the presence of a content-based governmental

action, plaintiffs need not show that the decision was "motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 563; Personnel Administrator of Massachusetts v. Feeney, 442 U.S. at 279 (plaintiff must show that the legislature acted "at least in part" for the purpose of accomplishing the adverse effects); United States v. City of Parma, Ohio, 494 F.Supp. at 1054.

6. A review of the direct and circumstantial evidence of legislative intent involved in the enactment of the statutory scheme challenged in this case persuasively establishes that content-

based considerations were "a motivating factor" in the adoption of the legislation. First, contemporaneous statements made by legislators on the floor of the South Carolina House and Senate and in committees during consideration of the proposed legislation repeatedly focused upon the SCEA and its affiliation with the NEA, advocacy of unpopular legislative proposals and participation in the political process. Many of these statements were made by the key floor leaders opposing payroll deductions for the SCEA and constituted their primary argument against the proposed legislation for professional associations.[15]

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15 Rep. Marchant's efforts to

Second, the effect of the legislation was to deny payroll deductions for the SCEA, which was in 1981 the only employee organization actively seeking and currently receiving payroll deductions. Further, when the State Employees Association decided prior to the 1985 legislative that it desired payroll deduction, the statutory scheme was altered to accommodate this similarly situated organization. While the adverse effect of this legislative scheme on the SCEA, standing alone, does

---

persuade the Internal Revenue Service to reclassify the SCEA as a labor organization, including hand-delivering his April 21, 1984 letter while in Washington for a meeting at the White House, further confirms the intention to deny specifically SCEA payroll deduction for content-related reasons.

not give rise to a legal right for the plaintiffs, the close correlation between the announced purpose of the bill at the time of the legislative debate and the ultimate adverse impact tends to corroborate the legislative intent of denying payroll deduction for content-based reasons. When the amendment was offered in the House to permit voluntary deductions of professional association dues, a lengthy filibuster by Rep. Larry Koon ensued. The House ultimately adopted both payroll deduction for professional association dues and the Marchant amendment, which was specifically tailored to address the situation of a professional association which paid over a portion of the proceeds of payroll

deduction to a labor organization. This amendment created a classification of one: the SCEA. Further, after the adoption of the Marchant Amendment, a new filibuster was started to stall legislative consideration while Rep. Marchant confirmed through an Attorney General's opinion that neither SCEA nor NEA could receive payroll deduction under this amendment. No other organization was referenced in Rep. Marchant's opinion request, and he specifically stated that his objective was to deny payroll deduction to the SCEA and NEA. Upon confirmation of the amendment's effect by the South Carolina Attorney General, the filibuster was terminated and the legislation was adopted by the House.

Moreover, when the bill adopted by the Senate contained a potential "loophole" for continuation of payroll deduction for the SCEA through teacher credit unions, the Conference Report, with Rep. Marchant's active encouragement, was twice rejected because it did not contain the full Marchant Amendment. Only after the Marchant Amendment was added to the Conference Report was the payroll deduction bill finally adopted by the House and Senate.

Additionally, the legislative history of payroll deduction for the State Employees Association further confirms the legislative intent to deny the benefits specifically to the SCEA. In 1985, despite the fact that the State

Employees Association did not meet the six part test contained in South Carolina Code Section 8-11-92, a special exception was created by name for the State Employees organization in the Appropriations Act of 1987 for non-germaneness, expedited legislative consideration of an independent bill authorizing State Employees Association payroll deduction was given in both the House and Senate.

Fourth, the sequence of events leading to the adoption of the statutory scheme confirms the intent to deny specifically the SCEA the benefit of payroll deductions. The House bill was filibustered until the Attorney General Specifically assured Rep. Marchant that the SCEA and NEA were ineligible for

payroll deductions. The Conference Report was twice rejected until the last possibility for payroll deductions for the SCEA, through credit unions, was eliminated. However, when a similarly situated and less controversial organization, the State Employees Association, sought payroll deductions, extra-ordinary efforts were undertaken to accommodate the group, despite the fact that it was classified as a "labor organization" under 501(c)(5) of the Internal Revenue Code.

Fifth, a careful review of the statutory language further corroborates the intention to tailor the legislation to deny payroll deductions specifically to the SCEA for content-related reasons. South Carolina Code § 8-11-92-(2)

expressly excludes "legal advocacy services which are provided directly to and specifically for one individual. . . ." The SCEA in 1981 was the only statewide employee organization providing direct legal services to its members in employee grievance matters. Section 8-11-92(3) and (4) requires that an eligible organization be classified as a 501(c)(3) and not a (c)(4), (c)(5) or (c)(6) organization. Section 8-11-92(6) requires that the qualifying organization not have a "parent organization" ineligible for payroll deduction benefits, regardless of whether payroll deduction proceeds were shared with the parent. Again, these provisions were designed to accomplish the announced purpose at the time of

enactment, to deny payroll deductions to the SCEA. Further, despite the elaborate six part test in § 8-11-92, when the State Employee Association sought payroll deductions, these provisions were ignored and a specific exception by name was provided to that organization.

Sixth, the testimony by legislators at trial regarding their intent, while not a persuasive as contemporaneous evidence at the time of enactment, tended to confirm the presence of content-based intent. The Court found particularly persuasive the testimony of Rep. Koon, Senator McConnell and former Senator and now United States Congressman, Arthur Revenel, who despite their continuing opposition to payroll

deduction for the SCEA, acknowledged content-based purposes for the adoption of the statutory scheme.

7. The record persuasively establishes that "a motivating factor" in the enactment of the challenged legislation was the denial of payroll deduction benefits to the SCEA because of its affiliation with the NEA, advocacy of unpopular legislative proposals, endorsements of candidates and other content-related reasons. Such factors go to the essence of the First Amendment and concern some of the most fundamental rights under the Constitution: freedom of association, right to petition, freedom of speech and right to participate in the democratic electoral process. Legislation which

withholds a benefit to parties because of their exercise of such fundamental rights can stand only where the defendants can establish the presence of a compelling State interest for the differential treatment afforded to the SCEA and the State Employees Association and demonstrate that the challenged legislation is narrowly drawn to accomplish this end. Arkansas Writer's Project v. Ragland, 105 S.Ct. at 1728.

8. In addition to the challenge to the statutory scheme under the content theory described above, plaintiffs assert that the legislation is violative of the Fourteenth Amendment under the principles of United States Department of Agriculture v. Mareno, 413 U.S. 528, 534 (1973), because there is

not present a legitimate governmental purpose to support the classification. The record before the Court establishes that "a motivating factor" in the adoption of the legislation was the desire to weaken and harm a politically unpopular organization. Such a legislative purpose does not constitute a legitimate governmental interest to support the classification under Mareno and constitutes a separate and independent basis upon which to declare the statutory scheme as applied to the SCEA unconstitutional.

9. The Court, having concluded that the challenged statutory scheme denies plaintiffs their rights under the First and Fourteenth Amendments of the United States Constitution, must devise

an appropriate remedy. While the Court has broad latitude within its equitable powers either to extend to the plaintiffs the benefits unlawfully withheld or to nullify the preference afforded to others, an extension rather than nullification is generally favored. Heckler v. Matthews, 465 U.S. 728, 739 n. 5 (1984); Califano v. Wescott, 443 U.S. 76, 89 (1979). See also, Califano v. Goldfarb, 430 U.S. 199 (1977); Jimenez v. Wineberg, 417 U.S. 628, 637-38 (1974); Frontiero v. Richardson, 411 U.S. 677, 691 n. 25 (1973). This remedy is particularly appropriate where the SCEA enjoyed widespread payroll deduction benefits until a portion of the challenged legislation was enacted in 1981, and nullification would result

in substantial injury to another employee organization and played no role in the injury suffered by the SCEA. Furthermore, the presence of a severability clause in the 1981 legislation evidences an intent by the General Assembly to save, if possible, lawful portions of the statute if certain provisions are found to be improper. Heckler v. Matthews, 465 U.S. at 739 n. 5; Welsh v. United States, 398 U.S. 333 (1970).

The Court hereby grants to the SCEA and its members payroll deduction benefits under the same terms and conditions provided to the State Employees Association. Specifically, the SCEA and its members shall be entitled to payroll deductions of

membership dues to the SCEA and any affiliate organization with any public sector employer within South Carolina, including public school districts, so long as the public sector employer consents to the payroll deductions and the SCEA does not engage in collective bargaining in the public sector or encourage its members to strike. The plaintiffs [sic] shall recover their costs, including attorney's fees pursuant to 42 U.S.C. Section 1988.

IT IS SO ORDERED.

MATTHEW J. PERRY
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina,
August 10, 1988.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3605

THE SOUTH CAROLINA EDUCATION ASSOCIATION, ET AL; NELLE H. TAYLOR; BETTY JANE CUNNINGHAM; MICHAEL T. HOLLIFIELD,

Plaintiffs-Appellees,

v.

JOHN T. CAMPBELL, In his Official Capacity as Secretary of State of South Carolina; CARROLL CAMPBELL, In his Official Capacity as Governor of the State of South Carolina; EARLE MORRIS, In his Official Capacity as Comptroller General of the State of South Carolina;

Defendants-Appellants,

THE SOUTH CAROLINA STATE EMPLOYEES ASSOCIATION; SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION, INC.; RICHLAND COUNTY SCHOOL DISTRICT NUMBER ONE; SPARTANBURG COUNTY SCHOOL DISTRICT NUMBER THREE; ORANGEBURG COUNTY SCHOOL DISTRICT NUMBER FIVE; MARLBORO COUNTY SCHOOL DISTRICT; JAMES M. BROWN, Superintendant and Chairman of the Board of Trustees of the Oconee County School District,

Amici Curiae

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On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees' petition for rehearing and suggestion for rehearing in banc, and motion for leave to file petition out of time were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS OFFERED that the motion for leave to file petition out of time is granted and the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Wilkens and Judge Kellam.

For the Court,

JOHN M. GREACEN
Clerk

Dated: October 18, 1989

No. 89-1019

Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

# In The Supreme Court Of The United States

OCTOBER TERM, 1989

SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM AND MICHAEL T. HOLLIFIELD,

Petitioners,

v.

JOHN T. CAMPBELL, as Secretary of State of South Carolina, CARROLL CAMPBELL, as Governor of the State of South Carolina, and EARLE MORRIS, as Comptroller General of the State of South Carolina,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

As is discussed herein, Respondents contend that the Petition should be denied. Because the "Questions Presented" by Petitioners include unfair characterizations of the record below, Respondents suggest that the questions be reformulated as follows:

1. Do this Court's decisions in United States v. O'Brien, 391 U.S. 367 (1968); McCray v. United States, 195 U.S. 27 (1904); and Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) preclude a federal court from invalidating facially neutral legislation, which merely defines the types of payroll deductions authorized for state

employees, on the basis of the anti-SCEA comments of a handful of legislators?

2. Does the First Amendment prohibit a state legislature from refusing to authorize payroll deductions to professional associations generally, including an organization whose outspoken political views had antagonized a handful of legislators?

3. Is a state legislature constitutionally required to assist a professional association in collecting dues simply because that association has taken positions on controversial public issues?

4. Is it rational for a state legislature to authorize payroll deductions for a single general interest association

which is open to all state employees without regard to their profession or occupation yet decline to authorize payroll deductions for all other special interest professional associations?

## PARTIES TO THE PROCEEDING

The parties before this Court are those set forth in the caption.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

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SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM and MICHAEL T. HOLLIFIELD,

Petitioners,

v.

JOHN T. CAMPBELL, as Secretary of State of South Carolina, CARROLL CAMPBELL, as Governor of the State of South Carolina, and EARLE MORRIS, as Comptroller General of the State of South Carolina,

Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

# RESPONDENTS' BRIEF IN OPPOSITION

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John T. Campbell, Carroll Campbell, and Earle Morris ("Respondents" or "State") respectfully request that the

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

## OPINIONS BELOW

The relevant opinions below are fully set out in the Appendix to the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are adequately set out in the Petition.

## STATEMENT OF THE CASE

Respondents do not adopt the Petitioners' Statement of the Case. A full and fair statement of the case is set out in the opinion of the United States Court of Appeals for the Fourth Circuit, which can be found at pages

A-2 through A-20 of the Appendix to the Petition. Respondents hereby adopt and incorporate the Fourth Circuit's statement by reference.

Several specific assertions made by Petitioners, however, warrant special mention. First, Petitioners assert that the members of the legislature made no attempt to mask their purpose -- "namely to injure the SCEA because of its advocacy of controversial legislative proposals, endorsements of candidates (including the endorsements of opponents of sitting members of the General Assembly) and affiliation with the National Education Association." The record does not bear this assertion out. The stated purpose of the legislation was to authorize payroll deductions for bona fide charities. Although the SCEA, as

well as other professional associations, were excluded, and although a small handful of legislators spoke out against the SCEA, this does not create an intent on the part of the legislature to injure the SCEA.

Second, Petitioners repeatedly attempt to suggest that the SCEA is the only organization that is adversely affected by the legislation. This is absolutely untrue. The record below indicates that there are numerous professional associations that represent various groups of state employees. The State of South Carolina employs more than 62,000 employees in some 2,000 job classifications. With

the exception of the State Employees Association, every single professional association representing state employees is excluded from payroll deductions.

Third, Petitioners state that the Fourth Circuit did not overturn or question the district court's finding that the purpose of the legislation was to deprive the SCEA of a valuable benefit. This is a misstatement. The Fourth Circuit reversed the district court's decision in its entirety. Moreover, the Fourth Circuit specifically held that the record was "manifestly sparse and contradictory" and that "the district court's imputation to the General Assembly of the apparent motivation of ten voluble legislators and general reliance on the testimony of select legislators was

inappropriate under both state and federal rules of statutory construction" (A. 51-52). Clearly, the Fourth Circuit concluded that the record did not establish the alleged purpose.

## REASONS WHY THE PETITION SHOULD BE DENIED

The Fourth Circuit's opinion is a thoughtful, well-written analysis of the legal and factual issues presented in this case. The arguments raised in the Petition, with the exception of the Bill of Attainder argument, were presented to the Fourth Circuit. The Fourth Circuit rejected each of these arguments and fully explained why. The reasons given by the Fourth Circuit are the same reasons that this Petition should be denied and are adopted herein by Respondents.

Respondents will not attempt to repeat these arguments, but simply will try to expand on them where appropriate.

I.

The Fourth Circuit's Decision Properly Applied The Supreme Court's Precedents

The Fourth Circuit recognized that the "SCEA's First Amendment claim is not founded on any direct impact the legislation has on free speech or the free flow of information . . . [but] rests on the alleged anti-SCEA motivation of the General Assembly in not authorizing withholding for SCEA membership dues" (A-21). Petitioners do not dispute this characterization of their claim. Nor do they dispute the Fourth Circuit's statement that the legislation "is facially neutral and merely defines the type of de-

ductions the State will authorize from the paychecks of state employees" and "does not prohibit, regulate, or restrict the right of the SCEA or any other organization to associate, to solicit members, to express its views, to publish or disseminate material, to engage in political activities or to affiliate or cooperate with other groups." Instead, they argue that federal courts are free to invalidate legislation on the basis of the subjective motivation of the legislature.

A. The Decisions Of This Court Reject The Notion That Legislation May Be Declared Unconstitutional Solely Because Of The Subjective Motivation Of The The Legislature.

This Court has for some 180 years rejected the idea that a federal court may invalidate legislation solely on

the basis of a perceived subjective motivation of the legislature. The Fourth Circuit's opinion contains a careful and complete analysis of the Supreme Court's decisions in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) and United States v. O'Brien, 391 U.S. 367 (1968) (A. 29-31).

The Fourth Circuit correctly noted that judicial inquiries into legislative motivation endanger the separation of powers doctrine. In Kilbourn v. Thompson, 103 U.S. 168 (1881), the Court stated, "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to governments, whether state or national, are divided into the three grand departments, -- the executive, the legislative, and the

judicial" and that "the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others." 103 U.S. at 190.

In Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), the Court quoted James Wilson, one of the framers of the Constitution and a former Supreme Court Justice, as having said that the doctrine of separate and independent powers dictated that the proceedings of each branch "should be free from the remotest influence, direct or indirect, of either of the other two powers." 295 U.S. at 630 (quoting Andrews, The Works of James Wilson (1896), (Vol. 1, p. 367).

In McCray v. United States, 195 U.S. 27 (1904), the Supreme Court

faced a constitutional challenge to a tax on oleomargarine. The allegation was made that Congress had acted on the basis of an improper purpose or motive. The Court reviewed in great detail the cases relating to the permissibility of such inquiries and stated that "[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." 195 U.S. at 56.

The Court explained that judicial inquiries into legislative motive are not permitted because such inquiries are inconsistent with the constitutional concept of separation of powers:

It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and all the grave functions lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and

> respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions.

195 U.S. at 54-55.

Where a legislative body exercises a lawful power for an improper motive or purpose, the remedy "lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power." 195 U.S. at 55.

B. This Case Does Not Fall Within the "O'Brien" Exception.

In United States v. O'Brien, 391 U.S. 367 (1968) this Court noted that there are limited exceptions to the principle that judicial inquiry into legislative motivation is prohibited,

i.e., when "the very nature of the constitutional question requires an inquiry into legislative purpose." 391 U.S. at 383 n. 30. The Fourth Circuit recognized that this exception includes race/sex discrimination cases, establishment of religion cases and First Amendment challenges to statutes "which on their face directly inhibit or have the inevitable effect of inhibiting freedom of speech or related constitutional rights" (A. 35-37). The Fourth Circuit held, however, that this case did not fit within any of these exceptions (A. 38).

Petitioners dispute the Fourth Circuit's analysis by citing the same cases that the Fourth Circuit distinguished. Each of the cases cited falls within one of the categories

which the Fourth Circuit recognized as being within the O'Brien exception. The distinctions drawn by the Fourth Circuit are well founded and cannot be overcome by mere recitation of the same cases that have been distinguished.

Significantly, Petitioners do not cite a single case in which a federal court overturned a statute solely because of motive when the statute did not on its face directly inhibit speech activities. In Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. 788, 797 (1985), the Court made it clear that the seminal issue in a First Amendment case is whether "speech protected by the First Amendment" is regulated, "for, if it is not, we need go no further." Cornelius involved a challenge to an

Executive Order which defined what organizations could and could not solicit contributions in the annual Combined Federal Campaign (CFC), a charity drive conducted in the federal work place during working hours. Because solicitation of contributions was deemed protected speech activity, it was necessary to look at whether the purpose of the Order was to suppress a particular point of view. 473 U.S. at 806.

Here, the Petitioners do not assert that payroll deductions constitute speech protected by the First Amendment. Given this concession, the Court "need go no further."

If Petitioners' argument is accepted, every piece of legislation is subject to challenge on the ground

that a handful of legislators spoke unfavorably of a particular individual or group who was adversely affected by the legislation or who, as here, was not granted a particular benefit. The consequences are obvious and should be avoided.

C. Petitioner's Reliance on Perry v. Sindermann Is Misplaced.

Petitioners cite Perry v. Sindermann, 408 U.S. 593, 597 (1972) for the proposition that government cannot deny a person a valuable benefit because of that person's exercise of First Amendment rights. In Perry, the Court noted that this principle has "most often" been applied "to denials of public employment." 408 U.S. at 597. Thus, the courts have held that public employees cannot be penalized or denied benefits because of the

exercise of First Amendment rights. It is one thing for courts to inquire into the motives of public employers in making employment decisions; it is quite another for a court to inquire into the subjective motivation of the supreme sovereign body of a state in enacting particular legislation when the legislation is obviously within the power of the body and has no facial impact whatsoever on freedom of speech.

When a court is reviewing an administrative decision of a local body, as opposed to a legislative act of the supreme sovereign body of a state, the separation of powers concerns outlined in McCray, supra, are not implicated. The nature and degree of intrusion that is inherent in the latter situa-

tion is the very reason that this Court has made it clear that courts will not strike down otherwise constitutional legislation solely on the basis of some alleged illicit motivation.

Furthermore, in the typical public employment case, the employee is concededly the sole target of the challenged action. The adverse effect is obvious and intended. This is not the case, however, when legislation is involved. Legislation, by its very nature, is intended to regulate a broad area of concern or interest to the public. It affects many persons and groups in different ways. Whereas inquiring into the motivation of a public employment decision is not particularly difficult, inquiring into the motivation, as opposed to the

facial purpose, of legislation enacted by a multi-member legislature is an impossible task, one that the courts have consistently declined to undertake.

Clearly, public employment cases are distinguishable and do not undermine the Supreme Court's teachings in Fletcher v. Peck and United States v. O'Brien.

D. Differential Taxation Cases Are Not Applicable.

Petitioners rely on this Court's decisions in Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987) and Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1973) for the proposition that differential treatment of similarly situated First Amendment Actors "is considered content-based discrimina-

tion, flatly prohibited by the First Amendment, regardless of the motive behind the law." (Petition pp. 55-56). These cases, however, do not support the proposition for which they are cited and have no application to this case.

Initially, Petitioners' use of the term "First Amendment Actor" is misleading. Presumably, every person or group that is capable of engaging in speech activities is a First Amendment actor. Surely, a legislature may draw lines between First Amendment actors. Otherwise, every piece of legislation which differentiates between individuals or groups would be subject to strict scrutiny. Had the challenged legislation limited the SCEA's right to engage in speech activities while permitting other or-

ganizations to speak fully and freely, strict scrutiny would arguably apply. That, however, is not the case. Thus, the Fourth Circuit explained:

> The 1981 legislation only defines the types of deductions the state will authorize from the paychecks of state employees and does not restrict, on its face, the First Amendment rights of the SCEA to solicit members, to speak in open fora, to associate with any other organization, to engage in political activities, or to otherwise represent its members.

(A. 38).

The differential taxation cases cited by Petitioners turn on the fact that differential taxation is viewed as a direct burden on freedom of the press. Thus, in Minneapolis Star, the Court stated that "the framers perceived singling out the press for taxation as a means of abridging the

freedom of the press." 460 U.S. at 585 n. 7.

Clearly, the differential taxation cases are unique. As the legislation here does not impose a tax, and does not regulate or restrict speech, these cases provide no guidance.

E. The Fourth Circuit Properly Discounted Reliance On Testimony Of Legislators.

Petitioners assert that the testimony of legislators should have been considered since none of them raised the privilege of immunity. Although no legislator raised immunity, the State objected to such testimony on the ground that it was not competent, relevant or probative.

The Fourth Circuit properly held that the extensive questioning of legislators regarding their motives

and the motives of other legislators was "inimical to the independence of the legislative branch and inconsistent with the constitutional concept of separation of powers" and would have "a chilling effect on the legislative process." (A. 49).

Moreover, the Fourth Circuit correctly noted that under South Carolina law, legislative testimony is not competent (A. 39 to 40). This Court has recognized that state rules regarding competent evidence of legislative intent are entitled to deference. Minneapolis Star, supra, 460 U.S. 575, 580 n.3 (1983).

## II.
## The Fourth Circuit's Decision Does Not Conflict With The Eleventh Circuit's Decision In Georgia Association of Educators v. Gwinnett County School District

Petitioners assert that the Fourth Circuit's decision is in direct conflict with the Eleventh Circuit's decision in Georgia Association of Educators v. Gwinnett County School District, 856 F.2d 142 (11th Cir. 1988). It is clear, however, that neither the factual nor the legal issues in that case are the same as those involved in this case.

In Gwinnett County, plaintiffs offered evidence that they had been receiving dues deductions for more than twenty years. The superintendent, however allegedly had become hostile toward the plaintiffs because of their association with the NEA.

Upon the recommendation of the superintendent, the five member school board voted 4 to 1 to terminate dues deductions for plaintiffs. The district court granted summary judgment for the school district. On appeal, the Eleventh Circuit found that there were material issues of fact to be resolved and remanded for trial.

There are a number of notable differences between Gwinnett County and this case. First and foremost, Gwinnett County involved a challenge to an administrative decision of a five member local school board. This case involves a challenge to a legislative act of the 170 member South Carolina General Assembly acting in its sovereign capacity. Thus, Gwinnett County did not implicate sepa-

ration of powers concerns and is more akin to public employment cases. Second, the practicalities of addressing the motivation of a five-member administrative body are substantially different from those involved in assessing the motivation of a 170 member legislative body. Thus, the concerns outlined in McCray and O'Brien, which are clearly implicated in this case, were not present in Gwinnett County.

Third, in Gwinnett County, the school board specifically terminated the practice of granting deductions. Here, despite the SCEA's attempts to portray the legislation as terminating their deductions, it is clear that the SCEA's loss of payroll deductions flowed from the opinion of the South Carolina Attorney General that no de-

ductions could legally be permitted absent statutory authorization. This was a neutral decision which impacted charities such as the United Way the same that it impacted the SCEA. Indeed, the Comptroller General announced that he would cease deducting for the United Way unless legislation was enacted. The legislation that was passed in 1981 did not terminate deductions for the SCEA. It simply did not authorize such deductions.

Fourth, the challenged action in Gwinnett County was admittedly aimed solely at the Plaintiffs. Here, the challenged legislation was facially neutral and impacted numerous organizations other than the SCEA.

Clearly, Gwinnett County involved entirely different factual and legal

issues. It is not the type of direct conflict that requires Supreme Court intervention.

III

The Challenged Legislation Is Not A Bill Of Attainder. Moreover, Petitioners Never Raised This Argument In The Lower Courts.

Petitioners suggest that the challenged legislation is a Bill of Attainder since the SCEA is excluded from receiving payroll deductions and this constitutes a burden on the organization. This argument is without merit.

Petitioners never claimed in either the District Court or the Court of Appeals that this legislation was a Bill of Attainder. They may not at this stage raise a claim that was

never presented to the lower courts.

Moreover, this Court has rejected the proposition "that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." Nixon v. Administrator of General Services, 433 U.S. 425, 469-470 (1977). The Court explained:

> By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group

> made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment . . . . However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," . . . it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

433 U.S. at 470-471.

Clearly, this legislation is not a Bill of Attainder. It does not single out the SCEA. All professional associations, except for the State Employees Association, are excluded. Furthermore, the legislation inflicts no "punishment." Nor does it impose

any burden on the SCEA. The legislation simply does not grant payroll deductions to the SCEA. The purpose of the legislation was not to injure the SCEA, but was to authorize payroll deductions for bona fide charities. The SCEA simply did not fall within the group that the General Assembly sought to benefit.

## CONCLUSION

The Fourth Circuit's opinion is thoughtful and comprehensive. Its analysis of the legal precedents and the factual issues is well founded and provides no basis for review by this Court. Nor are there any direct conflicts between the Fourth Circuit's decision and decisions in other circuits. Respondents respectfully request that the Petition be denied.

Dated this the 25th day of January, 1990.

Respectfully submitted,

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## FILING AND MAILING CERTIFICATE

I , Barbara E. Grove, hereby certify that on this 25th day of January, 1990, I filed with the Clerk's Office of the United States the foregoing Respondent's Brief in Opposition and further certify that I mailed this same date the required copies to the opposing counsel listed below:

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**STATE OF VIRGINIA/CITY OF RICHMOND:**

The foregoing Respondents' Brief in Opposition was acknowledged before me this 25th day of January, 1990 by Barbara E. Grove.

My commission expires: 12/23/90

Donna M. Metzger
Notary Public

Supreme Court, U.S.
FILED
FEB 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1019

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM and MICHAEL T. HOLLIFIELD,

*Petitioners,*

vs.

JOHN T. CAMPBELL, as Secretary of State of South Carolina, CARROLL CAMPBELL, as Governor of the State of South Carolina, and EARLE MORRIS, as Comptroller General of the State of South Carolina,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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In the

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SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM and MICHAEL T. HOLLIFIELD,

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v.

JOHN T. CAMPBELL, as Secretary of State of South Carolina, CARROLL CAMPBELL, as governor of the State of South Carolina, and EARLE MORRIS, as Comptroller General of the State of South Carolina,

Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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# REPLY BRIEF OF PETITIONER

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## Preliminary Statement.

Respondent's Brief in Opposition misstates the record in this matter and misinterprets key decisions of the Supreme Court in the area of the First Amendment, while at the same time conceding certain important points made

by Petitioners in its original petition. This reply brief is submitted to point out these errors and concessions.

STATEMENT OF THE CASE.

Respondents argue in their opposition that are numerous professional organizations representing various groups of state employees in the State of South Carolina that are excluded by the law in question. That is a totally misleading statement. The District Court found, and the Court of Appeals did not disagree that "the effect of the legislation was to deny payroll deductions for the SCEA, which was in 1981 the only employee organization actively seeking and currently receiving payroll deduction." (Petition for Certiorari, A-116). There was no evidence introduced to show that any other professional association was

seeking dues deduction or ever made any effort to obtain that benefit subsequently or was impacted or injured in any way. Indeed the only organization that came forward to complain about the law, the State Employees Association, received specific relief by name from the state legislature, as we previously pointed out (Petition for Certiorari, 25-28).

In addition, the Respondents have repeatedly referred to the fact that the legislation was "neutral on its face." But they completely ignore the fact that this supposedly "neutral" legislation was twice rejected by the General Assembly until it was amended to include the Marchant Amendment, which specifically prohibited dues deductions for professional associations that passed on any of the proceeds to a

Section 501 (c)(5) organization -- a situation that affected only the SCEA and the NEA and no one else that any witness could identify. (See Petition for Certiorari at 18-22, 9-60). The claim that this was facially neutral legislation with no improper purpose behind it is totally belied by the record.

## I.

## THIS COURT SHOULD REVIEW THE CONFLICT BETWEEN THE DECISION BELOW AND THE 11TH CIRCUIT DECISION IN GWINNETT COUNTY DEALING WITH PRECISELY THE SAME LEGAL AND FACTUAL ISSUE.

Respondent's Brief in Opposition places this case in the starkest possible posture for consideration by this Court. Respondents acknowledge that the decision in Gwinnett Association of Educators v. Gwinnett County School District, 856 F.2d 142 (11th Cir. 1988)

directly parallels the situation now before the Court, not only in its legal status, but in its factual presentation as well. They note that the individual school district in that case terminated dues deductions for the local education association because it was affiliated with the NEA, precisely the claim we make here. "The superintendent ...allegedly had become hostile toward the plaintiffs because of their association with the NEA." (Respondents Brief in Opposition at 25).

The 11th Circuit found that allegations that the school district had retaliated against a specifically targeted professional association because of its First Amendment activities stated a valid claim under Section 1983, since no governmental body can deprive an organization of a valued

benefit -- which all agree payroll dues deduction is -- because of its exercise of First Amendment rights.

Respondents now seek to distinguish Gwinnett County on the following basis: "Gwinnett County involved a challenge to an administrative decision of a five member local school board. This case involves a challenge to a legislative act of the 170 member South Carolina General Assembly acting in its sovereign capacity." (Respondents' Brief at 26). Elsewhere Respondents write that: "It is one thing for courts to inquire into the motives of public employers in making employment decisions; it is quite another for a court to inquire into the subjective motivation of the supreme sovereign body of a state..." (Respondents' Brief at 18).

In other words the Constitution prohibits an administrative agency or an executive department official from retaliating against a specifically targeted First Amendment actor on a local level because of its exercise of free speech rights. But the courts are forbidden to inquire into precisely the same acts against precisely the same group for precisely the same reasons when the governmental act is done by a state legislature on a state-wide basis. Respondents argue that the First Amendment does not apply to retaliatory legislation, only to administrative or executive retaliation, despite the fact that the words of the First Amendment speak only about legislative acts: "Congress shall make no law... abridging freedom of speech." (emphasis added).

Such an inverted concept of the First Amendment is directly counter to 200 years of our constitutional history and cannot be allowed to stand without review by this Court. The O'Brien case (United States v. O'Brien, 391 U.S. 367 (1968)) cannot be interpreted to prohibit an inquiry into legislative action which, if done on a local level by a school board or executive department official, would violate the Constitution. This situation must be interpreted as falling within the exceptions noted in O'Brien, namely "when the very nature of the constitutional question requires an inquiry into legislative purpose." 391 U.S. at 383, n. 10. The Court below was demonstrably wrong in interpreting O'Brien as barring an examination of

legislative purpose in a situation of this kind.

II.

PETITIONERS WERE NOT SEEKING TO INQUIRE INTO THE SUBJECTIVE MOTIVATION OF THE LEGISLATURE BUT WERE USING TRADITIONAL AND WELL-ESTABLISHED METHODS OF DETERMINING THE LEGISLATIVE PURPOSE OF THE SCHEME IN QUESTION.

Respondents try to divert this Court from the issues involved in this appeal by making constant reference to our attempt to determine the "subjective motivation of the legislature," as if we were trying to psychoanalyze all the members of the South Carolina General Assembly. (Respondents' Brief at 9). Nothing could be further from the truth.

In accordance with the traditional methods of discerning the purpose, intent or objective of a legislative scheme, Petitioners presented evidence of what the sponsors of the law said in

the legislative journals (see letter of Representative Marchant to the Attorney General about "a major point of concern being opposition to deductions for the [SCEA]" (Petition for Certiorari at 17), what was said on the floor, how much debate time was taken in discussing the SCEA and the NEA (80-90%, see id. at 11, n. 3) and other well-established methods of determining legislative intent. This followed the instructions of this Court in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977), where the Court established the methods by which inquiry into legislative (and administrative) purpose can be determined. It approved of the examination of "the legislative and administrative history...especially where there are contemporaneous

statements by members of the decisionmaking body..." This Court also noted that in "some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." Id. (In this case, no legislator-witness asserted any such privilege).

See also Edwards v. Aguillard, 107 S.Ct. 2573, 2579 (1987) (legislative purpose determined primarily on statements made by sponsor during legislative hearings); Wallace v. Jaffree, 105 S.Ct. 2479, 2490 (1985)(legislative purpose determined based on insertion of statement into record by sponsor and testimony of sponsor in later court hearing that he intended to return prayer to public

schools); Piper v. Chris-Craft Industries, 430 U.S. 1, 26-28 (1977) (legislative purposes of Williams Act determined based on statements by two cosponsors and testimony of witness before Senate Committee); Ohio v. Kovacs, 105 S.Ct. 705 (1985)(legislative purpose of Bankruptcy Code provision on discharge of claim to clean up hazardous waste determined based on statement of sponsor of Bankruptcy Reform Act).

In none of these cases was there any indication that this Court could not determine legislative intent because only a "handful of legislators" had spoken on the law. The Respondents' argument would make it impossible to determine what the objective of a law was unless a majority of voting members endorsed a particular position on its aim by a speech on the floor, an

impossible position contrary to every canon for interpreting legislative purpose.

In effect, Respondents are telling this Court that only if it blinds itself to what actually occurred during the 18-month campaign against the SCEA, can the law be upheld. There is nothing in the O'Brien case or the rules on interpreting legislative intent or purpose that can justify such a distorted view of constitutional analysis.

## III.

## THE FIRST AMENDMENT IS VIOLATED IF IMPORTANT ECONOMIC BENEFITS ARE DENIED TO A GROUP BECAUSE OF ITS EXERCISE OF FIRST AMENDMENT RIGHTS.

The Respondents argue that there was no constitutional violation here since there was no direct inhibition on First Amendment rights -- that is, the SCEA was still free to engage in political activities of every kind. Quoting from the opinion of the Fourth Circuit, Respondents claim that it is only when laws "directly inhibit or have the inevitable effect of inhibiting freedom of speech," is an inquiry into legislative purpose justified. (Respondents' Brief at 14).

This argument goes against fifty years of jurisprudence in this Court. As noted in Perry v. Sindermann, 408 U.S. 593, 597 (1972):

> "For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny the benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."

Similarly in Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 812 (1985), this Court noted that allegedly neutral laws and rules that on their face are not speech-inhibiting cannot be used as a facade "to suppress a particular point of view." But it is necessary to inquire into the purpose of the law or regulation to determine whether it has such a improper purpose.

These principles must be applied to the case now before the Court. The Fourth Circuit decision in requiring a showing of direct inhibition on First Amendment rights has ignored the holding of Perry and Cornelius and numerous other decisions of this Court that require an inquiry into the purpose and effect of laws regulating or sanctioning speech. Review by this Court of its distorted view of the First Amendment is necessary to bring it in line with 50 years of jurisprudence to the contrary.

## CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Dated: New York, New York
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